VINER (Charles) en 6144. e. 1.
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AN

ABRIDGMENT

OF THE

MODERN DETERMINATIONS

IN THE

Courts of Law and Equity:

BEING A

SUPPLEMENT

TO

VINER's ABRIDGMENT.

BY SEVERAL GENTLEMEN

IN THE RESPECTIVE BRANCHES OF THE LAW.

VOLUME THE FIFTH.

Game——Purchaser.

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Game. [G]

(A) Penalty of killing Game; and how to be recovered, and Pleadings. 14 Vin. 1.

1. TRESPASS *quare clauſum fregit*; the plaintiff declared that the defendant *being an inferior tradeſman*, to wit an apothecary, ſuch a day committed the treſpaſs by hunting in the plaintiff's cloſe: the defendant pleaded the general iſſue, not guilty; and upon the trial, a verdict was found for the plaintiff, damages 1*s*., and coſts 40*s*., ſubject to the opinion of the court, upon a caſe which ſtated, that the defendant, at the time of the treſpaſs, was a ſurgeon and an apothecary, and not qualified to hunt, or kill game within the intent of the ſtatutes; that on the day mentioned in the declaration, he was hunting with divers others not qualified, in company with a perſon who was properly qualified to kill game, and committed a treſpaſs in the plaintiff's cloſe. And the queſtion for the conſideration of the court was, whether, upon theſe facts, the defendant ſhould be deemed an *inferior tradeſman* within the meaning of the ſtatute 4 & 5 *W*. & *M*. *c*. 23. *ſ*. 10? The court, being equally divided in opinion, delivered the ſame *ſeriatim*; *Noel*, Juſt., and *Willes*, L. C. J. for the defendant, were of opinion "that the defendant could not be "ſaid to be an inferior tradeſman, nor a diſſolute perſon; and "conſequently that the plaintiff ought to have no more coſts than "damages." *Bathurſt* and *Clive*, Juſt. *contra*, "all qualified "tradeſmen are not inferior tradeſmen, but all unqualified "tradeſmen are inferior." *Buxton* v. *Mingay*, *C. B. Trin.* 30 & 31 *Geo*. 2. 2 *Wilſ*. 70.

2. In an action of debt on the ſtat. 5 *Ann*, *c*. 14., made perpetual by the ſtat. 9 *Ann*, *c*. 25., to recover a penalty for killing game without being duly qualified; it was held, that a *diploma*, conferring the degree of doctor of phyſic, granted by either of the univerſities in *Scotland*, does not give a *qualification* to kill game, under the 22 & 23 *Car*. 2. *c*. 25. *Jones* v. *Smart*, *K. B. Mich*. 26 *Geo*. 3. 1 *Durnf*. & *Eaſt's Rep*. 44.

3. The lord of a hundred, or wapentake, cannot grant a deputation to a gamekeeper. *The Earl of Ailesbury* v. *Pattiſon*, *K. B. Mich*. 19 *Geo*. 3. *Doug*. 28.

4. In treſpaſs againſt a juſtice of the peace for taking and carrying away the plaintiff's gun from him; upon the general iſſue, not guilty, the facts proved at the trial were, that the lord of the manor of *R.* duly appointed the plaintiff his *gamekeeper* within the ſaid manor; that the plaintiff hunted and beat for game within the manor, and purſued a covey of partridges out of the manor, but could not find them; and as he was returning to the manor of *R.* he was met by the defendant out of that manor, who demanded his gun, and took it from him. It alſo appeared, that the plaintiff was neither a qualified perſon to kill game by the laws of the realm, nor was properly a menial ſervant to the lord of the manor: and upon theſe facts, two queſtions were reſerved for the opinion of the court; firſt, whether the plaintiff was a perſon qualified to receive a deputation from the lord of the manor to be a gamekeeper; and ſecondly, ſuppoſing he was, whether the juſtice of the peace (the defendant), under the ſtat. 5 *Ann*, *c.* 14. *ſ.* 4. had a right to take the plaintiff's gun from him while he was ſporting for the purpoſe of killing game in *another manor*, out of the manor of *R.*? As to the firſt queſtion, the court were of opinion, that the plaintiff was a perſon properly qualified to receive a deputation from the lord of the manor to be a gamekeeper, although he was neither a qualified perſon, nor a menial ſervant to the lord of the manor; that the ſtat. 3 *Geo.* 1. *c.* 11. never was meant to check or hinder lords living at a diſtance from their manors from appointing any perſon whatſoever to kill game for the immediate uſe of the lord; if it was otherwiſe, this act would take away the right of every lord living at a great diſtance from his manor; the court were therefore of opinion, that the plaintiff was well qualified to kill game in the manor of *R.* and conſequently to carry a gun for that purpoſe. And upon the ſecond queſtion, the court ſaid, that the gamekeeper was neither within the words or meaning of the ſtat. 5 *Ann*, *c.* 14. *ſ.* 4. And were alſo of opinion, that the gun of a gamekeeper of a manor cannot be ſeized either *eundo*, or *redeundo*, or any *where elſe*, and that the defendant had no right to take away the plaintiff's gun from him. *Rogers* v. *Carter*, *C. B. Mich. Term.* 9 *Geo.* 3. 2 *Wilſ.* 387.

5. It is no defence to an action of debt for penalties on the game laws, that the defendant acted, *bonâ fide*, as gamekeeper to the manor in which the offence was committed under a void deputation. *Calcraft* v. *Gibbs*, *Mich.* 33 *Geo.* 3. *K. B.* 5 *Durnf. & Eaſt's Rep.* 19.

6. In a declaration on the ſtat. 5 *Ann*, *c.* 14. *ſ.* 4. for keeping a gun to kill and deſtroy the game, not being qualified, it is ſufficient to aver generally *that the defendant is not qualified ſo to do by the laws of the realm*; without ſhewing that he had not 100*l.* a-year. *Bluet*, *qui tam* v. *Needs*, *C. B. Eaſt.* 7 *Geo.* 2. *Com. Rep.* 522.

7. But in a conviction on the above ſtatute, it is neceſſary to ſhew ſpecially, that the defendant had not any of the qualifications mentioned in 22 & 23 *Car.* 2. *c.* 25. *The King* v. *Hill*, *Hil.*

Hil. 12 *Geo.* 1. *Ld. Raym.* 1415. *Stra.* 66. 1 *Burr.* 153. & *Doug.* 345.

Vide Rex v. Crowther, 1 Durnf. & East's Rep. 127. where it was ſaid by the court, "that there is no caſe in which it has been directly "decided that the evidence ſhould negative every particular qualification. It cannot be ſo from the "nature of the caſe."

8. In an action on the ſtat. 5 *Ann*, *c.* 14. for keeping and uſing a dog to kill and deſtroy the game, not being qualified, the declaration muſt ſtate what ſort of dog the defendant kept and uſed. *Reaſon* v. *Liſle*, *C. B. Trin.* 11 *G.* 2. *Com. Rep.* 576.

9. A declaration on the above ſtatute ſtating, that the defendant uſed a gun *being an engine to kill and deſtroy the game*, without averring that he *uſed it for the deſtruction of the game*, was held to be good after verdict; though it might have been different perhaps if this ambiguity had been aſſigned as ſpecial cauſe of demurrer. *Avery* v. *Hoole*, *Eaſt.* 18 *G.* 3. *B. R. Cowp.* 825.

10. Debt on 8 *G.* 1. *c.* 19. for the penalty of 30*l.* for uſing a hound to deſtroy game. After verdict for the plaintiff, the judgment was arreſted, for 5 *Ann*, *c.* 14. has not the word *hound*, and the words *other engines* come after *nets*, &c. and are applicable only to inanimate things. And this being a penal law cannot be extended. *Hooker* v. *Wilks*, 13 *G.* 2. *Stra.* 1126.

11. In an action of debt on the ſame ſtatute, to recover ſeveral penalties, for ſeveral offences committed on the ſame day, the plaintiff can only recover *one penalty*. *Molton* v. *Cheeſeley*, *Sittings after Eaſt. Term*, 28 *G.* 3. *Eſp. Caſ. Ni. Pri.* 1 *Veſ.* 123. *See alſo Cowp.* 640. & 3 *Durnf.* & *Eaſt's Rep.* 509.

So a conviction *ſuper præmiſſis* for three penalties of five pounds each for killing three hares, where it appears that it was done at the ſame time, is bad; for the ſtatute does not give five pounds for every hare, it being all but one offence. Com. Rep. 274.

12. If a perſon, not qualified to kill game, kills a pheaſant, or game by accident, he cannot take it away, without ſubjecting himſelf to the penalty for having game in his poſſeſſion. *Ibid.* 124.

13. A man was convicted of killing rabbits in a private warren, by inquiſition taken before a juſtice of peace, and was fined 20*s.* a rabbit: but this inquiſition was afterwards quaſhed by the court, upon the ground that the juſtice had no authority to ſet a fine upon a man for ſuch offence; for the ſtat. 22 & 23 *Car.* 2. *c.* 25. *ſ.* 4. gives treble coſts and damages, *but no fine*: and the ſtat. 4 & 5 *W.* & *M. c.* 23. extends only to game, which cannot be extended to rabbits kept in a private warren. *Rex* v. *Yates*, *Hil.* 8 & 9 *W.* 3. *B. R. Ld. Raym.* 151.

14. To a conviction on the ſtat. 5 *Ann*, *c.* 14. for *keeping* a lurcher to deſtroy game, not being qualified, exception was taken that it did not ſhew the defendant made uſe of the dog to deſtroy game; but this exception was not allowed; for the ſtatute is in the disjunctive, *keep or uſe*, ſo that the bare keeping a lurcher is an offence. *Rex* v. *Filer*, *Hil.* 8 *G.* 1. *Stra.* 496.

15. But a conviction on the ſame ſtatute, for *keeping a gun*, was quaſhed; for it was ſaid by the court, that a gun differs from nets and dogs, which can only be kept for an ill purpoſe, and therefore

a man cannot be convicted for the bare keeping of a gun. *Rex* v. *Gardner*, *Trin.* 11 *G.* 2. *Stra.* 1098. 1 *Wilf.* 315. S. P.

16. A conviction on the like ſtatute ſtating, that the defendant *did keep and uſe a gun to kill and deſtroy the game*, was held ſufficient. *Rex* v. *Thompſon*, *Trin.* 27 *G.* 3. *K. B.* 2 *Durnf. & Eaſt's Rep.* 18. *See alſo* 6 *Durnf. & Eaſt's Rep.* 177.

17. Two perſons cannot be convicted in ſeparate penalties under the above ſtatute for uſing a greyhound to deſtroy game, without being qualified, it being but one offence. *The King* v. *P. Bleaſdale and another*, *Trin.* 32 *G.* 3. *B. R.* 4 *Durnf. & Eaſt's Rep.* 809. *See alſo Bull. N. P.* 189. S. P.

18. If a conviction under the 31 *G.* 3. *c.* 21. *ſ.* 4. which enacts, that all convictions againſt that act may be made out "in the form, or to the effect following," (giving the form) contain all the ſubſtantial parts of that preſcribed, it is good, though it alſo contain ſomething more; for ſurpluſage will not vitiate a conviction. *The King* v. *J. Jeffreys*, *Trin.* 32 *G.* 3. *B. R.* 4 *Durnf. & Eaſt's Rep.* 767.

19. A *certiorari* was brought for removing a *conviction* upon the game laws, for the mere purpoſe of pleading it in bar of an action brought for the ſame offence, and not with any view of objecting to the conviction, the defendant having ſubmitted to it and paid the penalty; but having applied to the juſtice of peace for a copy of the conviction, and being refuſed, he had no other means of obtaining the ſame but by *certiorari*: the proſecutor however afterwards ſet it down in the paper, and got it affirmed; and the queſtion was, whether he was entitled to coſts? The court ſaid, that this was not a caſe within the intention of the act of parliament of 5 *Ann*, *c.* 14. *ſ.* 2., for this *certiorari* was not brought for vexation, nor to *over-haul* the conviction, but merely from neceſſity; and therefore the proſecutor was not entitled to his coſts upon affirmation of the conviction. *Rex* v. *Midlam*, *Trin.* 5 *G.* 3. *B. R.* 3 *Burr.* 1720.

20. An indictment for killing a hare was quaſhed, this not being a matter indictable, the ſtatute of *Ann* appointing a ſummary proceeding before juſtices of the peace. *Rex.* v. *Buck*, *Hil.* 12 *G.* 1. *Stra.* 679.

21. By 10 *G.* 2. *c.* 32. *ſ.* 7. "Any perſon who ſhall be convicted of unlawfully courſing, hunting, taking in toils, killing, wounding, or taking away any red or fallow deer, in any open, or unincloſed foreſt or chaſe, where deer are uſually kept, ſhall, during the continuance of the act 9 *G.* 1. *c.* 22., be guilty of a ſecond offence of the like nature, and ſhall be thereof lawfully convicted, upon indictment, or information, ſuch perſon ſhall be tranſported for the ſpace of ſeven years."

This, and the following ſection are, by the 16 Geo. 3. c. 30. ſ. 27., reſpectively repealed.

Sect. 9. "If any perſon armed ſhall, during the continuance of the ſaid act of 9 *G.* 1., come into any foreſt, chaſe, or park, wherein deer are uſually kept, with an intent to hunt, or take

"away,

" away, any red or fallow deer, and ſhall there unlawfully beat or " wound any keeper, or page of any ſuch foreſt, &c. their ſer- " vants, or aſſiſtants, in the execution of his or their office, or " offices, and be thereof lawfully convicted, every ſuch perſon " ſhall be tranſported for ſeven years."

Sect. 10. " If any perſon ſhall in any year between the 1ſt day " of *June*, and the 1ſt day of *October*, by hays, tunnels, or other " nets, drive, and take any wild duck, teal, widgeon, or any other " water fowl, in any marſhes, fens, or other places of reſort for " wild fowl, and ſhall be thereof convicted, he ſhall be liable to " the ſame penalties as by virtue of the 9 *Ann*, *c.* 25. he would " be liable to, if ſuch offence was committed between the 1ſt " *July*, and 1ſt *September*."

22. By 2 *G.* 3. *c.* 19. " No perſon, after the 1ſt *June* 1762, " ſhall, upon any pretence whatſoever, take, kill, deſtroy, carry, " ſell, buy, or have in his poſſeſſion, or uſe, any partridge, between " the 12th *February* and the 1ſt *September* in any year; or any " pheaſant, between the 1ſt *February* and 1ſt *October* in any year; " or any heath fowl, commonly called *black game*, between 1ſt " *January* and 20th *Auguſt* in any year; or any grouſe, com- " monly called *red game*, between 1ſt *December* and 25th *July* in " any year."

See the two following ſtatutes, which repeal this act.

Sect. 2. " If any perſon ſhall tranſgreſs this act in any of the afore- " ſaid caſes, every ſuch perſon ſhall, for every partridge, pheaſant, " heath fowl, or grouſe ſo taken, &c. forfeit five pounds to the " perſon who ſhall inform or ſue for the ſame."

23. By 13 *G.* 3. *c.* 55. *ſ.* 1. " No perſon ſhall, upon any pre- " tence whatſoever, wilfully take, kill, deſtroy, carry, ſell, buy, " or have in his poſſeſſion, or uſe, any heath fowl, commonly " called *black game*, between 10th *December* and 20th *Auguſt* in " any year; nor any grouſe, commonly called *red game*, between " 10th *December* and 12th *Auguſt* in any year; nor any buſtard, " between 1ſt *March* and 1ſt *September* in any year."

Sec. 13. of this act repeals that part of the 2 G. 3. c. 19. which relates to heath fowl and grouſe.

Sect. 2. " If any perſon ſhall, in any of the caſes aforeſaid, offend, " contrary to the true intent and meaning of this act, he ſhall " forfeit, and pay any ſum of money not exceeding twenty " pounds, nor leſs than ten pounds; and for the ſecond, and " every ſubſequent offence, any ſum of money not exceeding " thirty pounds, nor leſs than twenty pounds."

24. By 36 *G.* 3. *c.* 39. (after repealing part of the 2 *G.* 3. *c.* 19.) it is enacted, " That no perſon ſhall, on any pretence " whatſoever, take, kill, deſtroy, carry, ſell, buy, or have in his " poſſeſſion, or uſe, any partridge, between 12th *February* and " 14th *September* in any year; and if any perſon ſhall tranſgreſs " this act in the caſe aforeſaid, every ſuch perſon ſhall be liable " to the ſame penalty as mentioned in the above recited act."

25. By 28 *G.* 2. *c.* 12. (after reciting 5 *Ann*, *c.* 14.) it is enacted, " That if any perſon whatſoever, whether qualified or " not qualified to kill game, ſhall ſell, expoſe, or offer to ſale, any " hare, pheaſant, partridge, moor, heath game, or grouſe, every

" ſuch perſon ſhall, for every ſuch offence, be ſubject and liable " to the ſame forfeitures, pains, and penalties as are inflicted by " the ſaid recited act upon higglers, &c. for buying, ſelling, or " offering of game to ſale."

Sect. 2. " If any hare, &c. ſhall be found in the ſhop, houſe, or " poſſeſſion of any poulterer, ſaleſman, fiſhmonger, cook, or " paſtry-cook, the ſame ſhall be adjudged, deemed, and taken to " be an expoſing thereof to ſale."

26. By 5 *G.* 3. *c.* 14. *ſ.* 6. " If any perſon ſhall, from and after " 1ſt *June* 1765, wilfully and wrongfully, in the night time, en- " ter into any warren or grounds lawfully uſed or kept for the " breeding or keeping of conies, although the ſame be not in- " cloſed, and ſhall take or kill, in the night time, any coney, " againſt the will of the owner or occupier thereof, or ſhall be " aiding and aſſiſting therein, every ſuch perſon ſo offending ſhall " and may be tranſported for ſeven years, or ſuffer ſuch other " leſſer puniſhment, by whipping, fine, or impriſonment, as the " court, before whom ſuch perſon ſhall be tried, ſhall in their diſ- " cretion award and direct."

Sect. 8. enacts, " That nothing in this act contained ſhall extend " to prevent any perſon from killing and deſtroying, or from " taking and carrying away, in the day time, any conies that ſhall " be found on any ſea or river banks, erected or to be erected for " the preſervation of the adjoining lands from being overflowed, " or upon any land within one furlong diſtance of ſuch ſea or " river banks; but that it ſhall and may be lawful to and for any " perſon to enter upon any ſuch banks or lands, within the county " of *Lincoln*, and to kill, deſtroy, take, and carry away, in the day " time, to his own uſe, any conies found thereon, he doing as " little damage as may be to the owner or tenant of ſuch banks or " lands."

By ſ. 5. of this act all the proviſions of the 10 G. 3. c. 19. are repealed.

27. By 13 *G.* 3. *c.* 80. (after reciting the 10 *G.* 3. *c.* 19.) it is enacted, " That if any perſon ſhall knowingly and wilfully kill, " take, or deſtroy any hare, pheaſant, partridge, moor game, or " heath game, or uſe any gun, dog, ſnare, net, or other engine, " with intent to kill, take, or deſtroy any hare, &c. in the night, " that is to ſay, between the hours of ſeven at night and ſix in " the morning, from 12th *October* to 12th *February*; and between " the hours of nine at night and four in the morning, from 12th " *February* to 12th *October*; every ſuch perſon, being convicted " thereof, ſhall forfeit and pay, for the firſt offence, any ſum not " exceeding twenty pounds nor leſs than ten pounds; and for the " ſecond offence, any ſum not exceeding thirty pounds nor leſs " than twenty pounds."

Sect. 6. enacts, " That if any perſon ſhall upon a *Sunday*, or on " *Chriſtmas-day*, in the day time, knowingly and wilfully take, " kill, or deſtroy any hare, pheaſant, partridge, heath game, or " moor game, or ſhall upon a *Sunday*, or on *Chriſtmas-day*, uſe " any gun, dog, net, or engine for taking, killing, or deſtroying " any hare, &c. every ſuch perſon, being convicted thereof, ſhall

" be

" be ſubject to the like forfeitures and penalties as are herein-
" before enacted to be inflicted for other offences againſt this
" act."

28. By 25 *G.* 3. *c.* 50. *ſ.* 1. (after repealing the ſtatute 24 *G.* 3. *c.* 43.) it is enacted, " That every perſon in *Great Britain*, who
" ſhall uſe any dog, gun, net, or other engine for the taking or
" deſtruction of game, not acting as a gamekeeper, under or by
" virtue of a deputation or appointment duly regiſtered, ſhall an- *Vide* 31 G. 3.
" nually take out a certificate thereof; that every deputation or c. 21.
" appointment of a gamekeeper, granted to any perſon by any
" lord or lady of a manor in *England* or *Wales*, ſhall be regiſtered
" with the clerk of the peace of the county, riding, or place in
" which the ſaid manor lies, and the gamekeeper, ſo appointed,
" ſhall annually take out a certificate thereof."

Sect. 8. " If any perſon ſhall uſe any greyhound, hound, pointer,
" ſetting dog, ſpaniel, or other dog, or any gun, net, or other
" engine for the taking or deſtruction of any hare, pheaſant, par-
" tridge, heath fowl, or grouſe, or any other game what-
" ſoever, without having obtained ſuch certificate, every ſuch
" perſon ſhall forfeit and pay the ſum of twenty pounds."

Sect. 9. " If any perſon, to whom any deputation or appointment
" of a gamekeeper ſhall have been or ſhall be granted as aforeſaid,
" ſhall, for the ſpace of twenty days next after ſuch deputation
" ſhall thereafter be firſt granted, neglect or refuſe to regiſter the
" ſame, and take out a certificate thereon, in the manner herein-
" before directed, every ſuch perſon ſhall forfeit and pay the ſum
" of twenty pounds."

(B) Proſecution; when, and how, and by whom tried. 14 Vin. 4.

1. BY 2 *G.* 3. *c.* 19. *ſ.* 5. (after reciting the ſtatute 8 *G.* 1. *c.* 19.) it is enacted, " That all pecuniary penalties under the ſaid
" act may be ſued for and recovered to the ſole uſe of the proſe-
" cutor; and if he recovers the ſame by action or information,
" he ſhall be entitled to double coſts."

Sect. 6. " That no action or information ſhall be brought or ex-
" hibited, but within the ſpace of ſix months next after the mat-
" ter or thing done, for which the ſame ſhall be commenced or
" exhibited as aforeſaid."

2. By 2 *G.* 3. *c.* 29. (after reciting the ſtatute 1 *Jac.* 1. *c.* 27.) it is enacted, " That if any perſon ſhall ſhoot at, with an intent
" to kill, or ſhall, by any means whatever, kill or take, with a
" wilful intent to deſtroy, any houſe dove or pigeon, and ſhall be
" thereof convicted before any juſtice of the peace of the county
" wherein any ſuch offence ſhall be committed, every perſon ſo
" offending ſhall, for every ſuch offence, forfeit and pay the ſum
" of twenty ſhillings to the informer; and in caſe the money ſhall
" not be forthwith paid, the offender to be committed to gaol for

" any time not exceeding three calendar months, nor leſs than one " calendar month."

Sect. 2. " Provided always, that nothing in this act contained " ſhall be conſtrued, deemed, or taken to hinder any owner of a " dove cote, pigeon houſe, or other place erected for the preſer- " vation or breeding of pigeons from taking, killing, or deſtroying " all or any houſe doves or pigeons which ſhall at any time be " taken therein."

Sect. 3. " Provided further, that no perſon, who ſhall be con- " victed of any offence againſt this act, ſhall be liable to be " convicted for any ſuch offence under any former or other act; " and that no perſon ſhall be proſecuted for any offence againſt " this act, unleſs the proſecution ſhall be commenced and carried " on with effect within the ſpace of two calendar months after " any ſuch offence ſhall be committed."

[D]

Gaming.

14 Vin. 4.

(A) Reſtrained by Common Law or Statutes.

Vide the Statute.

1. BY 18 *G.* 2. *c.* 34. If any perſon ſhall win or loſe at play, or by betting, at any one time, the ſum or value of 10*l.*, or within the ſpace of 24 hours, the ſum or value of 20*l.*, he ſhall be liable to be indicted for ſuch offence within ſix months, either in *B. R.* or at the aſſizes; and being convicted, ſhall be fined five times the value of the ſum loſt or won, which (after ſuch charges as the court ſhall judge reaſonable allowed thereout to the proſecutor and evidence) ſhall go to the poor.

2. By ſame ſtatute, the penalties of 12 *G.* 2. *c.* 28. are extended to the game of roulet, *alias* roly poly, and all prohibited games with cards or dice.

3. By 30 *G.* 2. *c.* 24. *ſ.* 14. perſons keeping public houſes, &c. ſuffering gaming there by journeymen, labourers, ſervants, or apprentices, and convicted by juſtices of peace, ſhall forfeit 40*s.*, and for every offence afterwards 40*l.*

4. By 25 *G.* 2. *c.* 36. any houſe, room, garden, or other place kept for public dancing, muſic, or other entertainment of the like kind, in *London* or within 20 miles thereof, without licence, according to that ſtatute (except *Drury Lane*, *Covent-Garden*, and *Hay-Market* theatres, and other entertainments exerciſed by letters patent or licence of the crown or lord chamberlain) ſhall be deemed a diſorderly houſe or place, and the keeper thereof ſhall forfeit

forfeit 100*l.* with full coſts to him who ſhall ſue (in ſix months) in any of the courts at *Weſtminſter*. And the perſon who ſhall appear to act as maſter, or as having the management of ſuch diſorderly houſe, ſhall be deemed a keeper thereof.

5. 27 *G.* 3. *c.* 1. which takes away the ſummary juriſdiction of magiſtrates over offences concerning the lottery, extends only to ſtate lotteries, and does not repeal their power over games of chance or lotteries prohibited by 12 *G.* 2. *c.* 28. *Rex* v. *Liſton*, 5 *Term Rep. B. R.* 338.

(B) What Gaming is within the ſeveral Statutes.

14 Vin. 6.

1. PLAYING at bowls, out of *Chriſtmas*, ſubjects every labourer to the penalty of 40*s.* under 33 *H.* 8. *c.* 9. *ſ.* 16. but does not make him an idle and diſorderly perſon under 17 *G.* 2. *c.* 25. *Rex* v. *Clarke*, *Cowp.* 36.

2. Horſe-racing is gaming within 16 *Car.* 2. *c.* 7., and money won as a wager on it cannot be recovered. *Goodburn* v. *Marley*, 2 *Stra.* 1159. *Blaxton* v. *Pye*, 2 *Wilſ.* 309. *Johnſon* v. *Baun*, 4 *Term Rep. B. R.* 1. *See alſo Bonner* v. *Quick*, *cited per Aſton*, *J.* 2 *Black. Rep.* 708.

3. A foot-race is within 9 *Ann*, *c.* 14. But if *A.* lays a wager with *B.* that *C.* cannot run on a certain day four miles in twenty-one minutes and an half, and *C.* does run it, and the money was paid to *B.*, if it is not laid that *C.* was playing at a game called a foot-race, ſuch wager is not betting within the ſtatute. *Lynell* v. *Longbottom*, 2 *Wilſ.* 36.

One perſon running alone againſt time is a foot-race within the ſtatute. *Brown* v. *Berkley*, *Cowp.* 281.

4. Cricket is a game within 9 *Ann*, and a bond given as a collateral ſecurity for money won at it is void. *Jeffreys* v. *Walter*, 1 *Wilſ.* 220.

5. *Aſſumpſit* on a wager of 100 guineas and the expences of travelling, that *A.* would perform a journey of 240 miles in a poſt chaiſe and pair of horſes in 24 hours, is an illegal wager, and judgment was arreſted on that account after plaintiff had obtained a verdict. *Ximenes* v. *Jacques*, 6 *Term Rep.* 499.

6. A horſe-race for 25*l.* a ſide, play or pay, though one gives the other 5*l.* to make the match, is a match for 50*l.* and legal within 13 *G.* 2. *c.* 19. *Bidmead* v. *Gale*, 4 *Burr.* 2432.

7. Tumbling is not an entertainment of the ſtage within the meaning of 10 *G.* 2. *c.* 28. *Rex* v. *Handy*, 6 *Term Rep.* 286.

8. But dancing at the opera houſe is, and therefore no action can be maintained for the breach of an agreement "to dance at the king's theatre in the *Hay-Market*, or at ſuch other place as the plaintiff ſhould appoint," if it appear that no licence for that theatre was granted by the Lord Chamberlain as required by 10 *G.* 2. *c.* 28. and that the plaintiff did not requeſt the defendant

to

to dance at any other place that was ſo licenſed. *Gallini* v. *Laborie*, 5 *Term Rep. B. R.* 242.

9. No action will lie on a wager reſpecting the mode of playing an illegal game; therefore the judge at *niſi prius* ordered a cauſe to be ſtruck out of the paper in which the wager was "whether there were more ways than ſix of nicking ſeven on the dice," allowing ſeven to be the main, and eleven a nick to ſeven, becauſe all games with dice are prohibited. *Brown* v. *Leeſon*, 2 *Hen. Black. Rep.* 43.

10. If the parties play from *Monday* evening to *Tueſday* evening without any interruption, except for an hour or two at dinner, this is all one ſitting; for to loſe at one ſitting is to loſe in a courſe of play where the company never parts, though they may not actually be gaming the whole time. *Bowes* v. *Booth*, 2 *Black.* 1226.

11. If five guineas be betted againſt ten, the party who wins the five guineas cannot recover them, becauſe by 9 *Ann* the other could not have recovered the ten, and therefore there is no mutuality. *Clayton* v. *Jennings*, 2 *Black.* 706.

12. Money lent at play on a man's bare word may be recovered, for it is not within ſtat. 9 *Ann*, *c* 16. which has not the word contract. *Barjeau* v. *Walmſley*, *H.* 19 *G.* 2. *Stra.* 1249.

13. *A.* gives a bill of exchange drawn by himſelf on himſelf, and accepted by himſelf, to *B.*; part of the conſideration is money loſt at play, the reſt money lent at the time and place of play; *B.* cannot recover any thing on the bill of exchange, but he can recover the money lent on the contract, and ſhall have intereſt from the time the bill became payable to the judgment. *Robinſon* v. *Bland*, *M.* 1 *G.* 3. 2 *B. M.* 1077. *Vide Doug.* 741, (714.)

14. If *A.* gives a note to *B.* for money by him knowingly advanced to *A.* to game with at dice, and *B.* indorſes it for a full conſideration to *C.* who is ignorant that any of the money had been lent for gaming, yet *C.* cannot maintain an action for it. And *Lee*, Ch. J. ſaid the *dictum* of *Holt*, C. J. in *Huſſey* v. *Jacob*, was not the point adjudged, and all the bar wondered at it. *Bowyer* v. *Bampton*, *Tr.* 14 *G.* 2. *Stra.* 1155.

15. A wager that *A.* had purchaſed a waggon of *B.* is not void at common law, nor prohibited by ſtatute 14 *G.* 3. *c.* 48. and an action may be maintained on it. *Per* three juſtices, *Buller*, J. *contra*. *Good* v. *Elliot*, 3 *Term Rep.* 693.

16. That wagers are legal by the law of *England*, unleſs forbidden by ſtatute. *See Jones* v *Randall*, *Cowp.* 37. *Da Coſta* v. *Jones*, *ib.* 729. *and the Caſes cited in Good* v. *Elliot*, *ut ſupra.*

18 Vin. 7.

(C) Actions and Pleadings.

1. IF defendant is convicted on 9 *Ann*, *c.* 14. which gives five times the value to the common informer, the judgment is only *quod convictus ſit*, and an action for the forfeiture muſt be brought on the judgment. *Rex* v. *Luckup*, 2 *Stra.* 1048.

See 7 T. Rep. 461. n. (a.)

2. Debt

2. Debt on bond—Plea that part of the ſum mentioned on the condition, *ſcilicet* 1500*l.* was won by gaming contrary to the ſtatute, *per quod* the bond became void. Plaintiff replies, that the bond was given for a juſt debt, and traverſes that the 1500*l.* was won by gaming *contra formam ſtatuti modo et forma*, as the defendant has pleaded, *demurrer inde*. The replication was held bad; for the material part of the plea is, that part of the money for which the bond was given was won by gaming, and *ſcilicet* ſo much is only matter of form of which no notice ſhould be taken on the replication. But two objections were made to the plea. 1ſt. The words of the ſtatute are not purſued: the ſtatute ſays, the bond ſhall be void when it is given for money won by gaming; whereas the plea is, that the money for which the bond was given, was won by gaming. *Sed per Cur.* it amounts to the ſame thing, and is good to a common intent. 2d. It is not ſhown at what play or game the money was loſt, and that ought to appear to the court, that they may judge whether it is ſuch gaming as is contrary to the ſtatute. And *per Cur.* it ought to be mentioned, for it is matter of law, and not evidence, and the ſaying in general, that it was *contra formam ſtatuti*, will not be ſufficient. Wherefore the plaintiff had judgment. *Colborne* v. *Stockdale*, 1 *Stra.* 492.

(D) Caſes in Equity.

[F] 14 Vin. 8.

1. A Mortgage ordered to ſtand as a ſecurity for the money *bonâ fide* advanced, but to be forfeited as to the money won at play. The enforcing the gaming act is of great conſequence to the public, and not confined to the intereſt of private perſons. *Nov.* 29th, 1742. *Fleetwood* v. *Janſen and another*, 2 *Atk.* 467.

2. Bond for money won at play, and part of it paid. Court ordered the money to be repaid, and relieved againſt the bond. *April* 24th, 1755. *Mawden* v. *Shadwell*, *Amb.* 269.

3. The right to ſue for money loſt at play, given by ſtatute 9 *Ann*, *c.* 14. to the loſer, is a veſted intereſt; and upon his bankruptcy paſſes to his aſſignees. *Dec.* 14th, 1794. *Brandon* v. *Sands*, 2 *Veſ. jun.* 514.

4. A bill for diſcovery of money won at play, by a common informer, will not lie, till he has commenced ſome ſuit for relief. *Eaſt.* 32 *G.* 3. *Mynd* v. *Francis*, 1 *Anſtr.* 5.

5. Bill for diſcovery of money and relief on 9 *Ann*, for penalties againſt the winner of more than 10*l.* at play. The plaintiff did not ſtate himſelf to have been the loſer, nor that three months had elapſed before the bill filed, which is required by the ſtatute before a ſuit can be commenced by a common informer. And a demurrer was allowed. *Mich.* 35 *G.* 3. *Hudſon* v. *Davis*, 2 *Anſt.* 504.

6. Bill for an injunction, and to have certain bills of exchange, upon which an action had been commenced at law, delivered up, having

having been given for money won at play, ruled good upon demurrer *Hil.* 35 *G.* 3. *Newman* v. *Franco*, 2 *Anſtr.* 519.

7. A bill lies to have a diſcovery of the conſideration of a ſecurity alleged to have been given for money won at play, and to have it delivered up. *Mich.* 36 *G.* 3. *Andrews* v. *Berry*, 3 *Anſtr.* 634.

8. In a bill of diſcovery to ſupport an action by a common informer for money won at play, it is ſufficient to ſtate that the defendants, or ſome of them, for the benefit and on account of all, played and won. And it is not neceſſary to ſtate the nature of the action brought, but that an action was brought on the ſtat. 9 *Ann*, to recover the money, and to ſhew by the facts that an action lay. *Hill.* 37 *G.* 3. *Cowan* v. *Phillips and others*, 3 *Anſtr.* 843.

9. Injunction granted to prevent the negociating a note obtained at play, upon affidavit, before ſervice of ſubpœna. *Hil.* 37 *G.* 3. ——— v. *Blackwood and others.* 3 *Anſtr.* 851.

[G]

Gaol.

(B) Belong, to whom.

24 Vin. 9.

1. BY 27 *G.* 3. *c.* 17. it is enacted, "That from and immediately after the payment of 10,500*l.* to certain perſons "therein named, the priſon of the marſhalſea of the court of "king's bench, and the power of granting the cuſtody of the ſaid "priſon, and the office of marſhal of the marſhalſea, ſhall be re-"veſted in his majeſty, his heirs, and ſucceſſors, and ſhall for ever "thereafter remain and be unalienable."

(C) Repaired; at whoſe Expence.

24 Vin. 10.

1. THE lord of a franchiſe is not bound, merely as lord, to repair the gaol within it, without an immemorial uſage to charge him. *Rex* v. *the Earl of Exeter*, *Trin.* 35 *G.* 3. 6 *Durnf. & Eaſt's Rep.* 373.

Gaoler. [G]

(C. 2) Puniſhable for other Offences than Eſcapes. 14 Vin. 12.

1. BY 24 *G.* 2. *c.* 40. *ſ.* 13. it is enacted, "That if any gaoler, "keeper, or officer of any gaol, priſon, or houſe of correc- "tion, ſhall ſell, uſe, lend, or give away, or knowingly permit, or "ſuffer any ſpirituous liquors, or ſtrong waters to be ſold, uſed, "lent, or given away in any ſuch gaols, priſons, or houſes of cor- "rection, or brought into the ſame, other than and except ſuch "liquors as ſhall be preſcribed by the phyſician, ſurgeon, or "apothecary, every ſuch gaoler, &c. ſhall, for every ſuch offence, "forfeit the ſum of one hundred pounds; and for the ſecond of- "fence, it ſhall be deemed a forfeiture of his office."

2. By 32 *G.* 2. *c.* 28. *ſ.* 11. it is enacted, "That upon the "petition, in term time, of any priſoner, complaining of any ex- "tortion by any gaoler, or of any other abuſe whatſoever com- "mitted by ſuch gaoler, unto any of his majeſty's courts of record "at *Weſtminſter*, from whence the proceſs iſſued by which any "perſon, who ſhall ſo petition, was arreſted, or under whoſe "power or juriſdiction any ſuch gaol, priſon, or place is; or, in "vacation time, to any judge, or to the judges of aſſize or juſtices "of great ſeſſions; every ſuch court, judges of aſſize, and juſtices "of great ſeſſions, are hereby authorized and required to hear and "determine the ſame, in a ſummary way, and to make ſuch order "thereupon for redreſſing the abuſes which ſhall be complained "of, and for puniſhing ſuch officer or perſon complained "againſt, and for making reparation to the party injured, as they "ſhall think juſt, together with the full coſts of every ſuch "complaint."

(D) Allowances.

1. BY 32 *G.* 2. *c.* 28. *ſ.* 12. it is enacted, "That no gaoler ſhall "demand, take, or receive, directly or indirectly, of any "priſoner for debt any other or greater fees whatſoever for his "commitment or coming into gaol, chamber rent there, releaſe "or diſcharge, than what ſhall be mentioned or allowed in the "table of fees, which ſhall be ſettled in the manner hereinbefore "directed; and that every perſon, who ſhall offend againſt this "act, ſhall forfeit to the party grieved fifty pounds."

2. The

2. The warden of the *Fleet* priſon cannot demand an additional fee for expedition in returning a writ of *habeas corpus*. *Johnſon* v. *Smith*, 1 *Hen. Bl. Rep.* 105.

[E] Glebe.

14 Vin. 19 (A) Glebe in general; and in what Caſes it ſhall pay Tithes.

1. A Mill is erected upon glebe land, parcel of a parſonage, which came to the king by the ſtatute of diſſolutions. The vicar, who is endowed with ſmall tithes, ſues the parſon for the tithes of the mill. The parſon applies for a prohibition: 1ſt, becauſe the glebe upon which the mill is erected was diſcharged of the payment of tithes: 2d, becauſe the vicar's endowment does not extend to the tithes of a mill. But the prohibition was denied; for the mill, being lately erected, tithes ought to be paid for it, and the extent of the endowment is a matter triable in the ſpiritual court. The diſcharge of the glebe cannot extend to a mill erected *de novo*. *Anon. Tr.* 15 *Jac.* 1. 1 *Gwil. on Tithes*, 286.

2. In an action of treſpaſs upon the opening of the cauſe upon demurrer, it was holden by the court, that a rectory might be without glebe. For by *Hyde*, the parſon may convey away all his glebe; and he ſaid, that he had ſeen ſeveral compoſitions between the vicar and the parſon, by which the parſon gave all his tithes and glebe to the vicar, and reſerved a rent only for himſelf. And by *Whitlocke*, originally a parſon might be without glebe. For the common law, upon creating a parſon, gave him tithes only, and the glebe is only an additament to him *ex dono fundatoris*. *Edgar and others* v. *Sorrel and others*. *Tr.* 5 *Car.* 1. 2 *Gwil.* 435.

3. Bill by vicar for tithes.—Defendant inſiſted he was tenant of the glebe lands under *Eaton* college, and that no tithe for that land was due to the vicar. *Per Cur.* In regard the glebe land of which the plaintiff demands tithe is not of common right tithable to the plaintiff, and the plaintiff has not made any ſufficient proof of payment of tithes to him for the ſame, let the bill be diſmiſſed. *Streaton* v. *Downes*, *Tr.* 2 *W. & M.* 2 *Gwil.* 536.

4. A vicar, endowed with the glebe, has a right to the great tithes growing thereon, although he has no right to the great tithes in general in the pariſh. So held.

N. B. In this caſe, the vicar had let his glebe which was ſowed with corn, and he then died. The court decreed, that the next vicar ſhould have the tithe of the corn, and not the impropriator. *Sanders* v. *Ryall*, *H.* 3 & 4 *W. & M.* 2 *Gwil.* 537.

Goldsmiths' Notes. [D]

See *Suppl.* tit. *Bills of Exchange*, (B), *&c.* 14 Vin. 21.

Good Behaviour. [G]

(B) In what Cases, and of what Persons, and by whom. 14 Vin. 22.

1. IN the case of a libel, no surety of the peace or bail can be required: and *per Pratt*, Ch. Just. "I cannot find that a "libeller is bound to find surety of the peace, in any book what-"ever, nor ever was in any case, except one, *viz.* the case of the "seven bishops, where three judges said, that surety of the peace "was required in the case of a libel: Judge *Powell*, the only "honest man of the four judges, dissented, and I am bold to be of "his opinion, and to say that case is not law." *Rex* v. *Wilkes*, *East*, 3 *G.* 3. *C. B.* 2 *Wils. Rep.* 160.

(D) Discharged, or superseded.

1. BY consent, the recognizance may be discharged. *Rex* v. *Earl Ferrers*, *Mich.* 32 *G.* 2. *Bur. Rep.* 703.

Grants. [F]

Note 2 to *Co. Litt.* 384. *b.* contains a full discussion of the operation of the word "*Grant*" to imply a warranty. The *legal* import of this term appears, in conveyances in fee simple, to have changed with the alteration made in the relative situations of grantor and grantee by the statute of *Quia Emptores*; but it may be observed, as to its etymon, that it is merely a contraction of the verb "*guarantir*," to warrant.

2. The warden of the *Fleet* priſon cannot demand an additional fee for expedition in returning a writ of *habeas corpus*. *Johnſon* v. *Smith*, 1 *Hen. Bl. Rep.* 105.

[E] Glebe.

14 Vin. 19 (A) Glebe in general; and in what Caſes it ſhall pay Tithes.

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14 Vin. 159. (R. a) Grants *made good in Equity*, though not ſtrictly good in Law.

1. HENDERSON, the plaintiff, being aſſignee of a leaſe of a public houſe, without any covenant reſtrictive of alienation without licence, agreed for the grant of a leaſe of the ſame, with proper and uſual covenants. A covenant not to aſſign without licence does not come within a contract to grant a leaſe with common and uſual covenants. *Jan.* 1792. *Henderſon* v. *Hay*, 3 *Bro.* 632.

2. Grants are to be taken as ſtrongly in favour of the objects and againſt the grantor, as fair inference will allow. *Feb.* 1796. *Swann* v. *Fonnereau*, 3 *Veſ. jun.* 48.

3. When a bill is filed for an account of tithes againſt one who had a leaſe of his own, and the other tithes in the pariſh, and the whole queſtion in the cauſe turns on the validity of the leaſe, and of the notice given to determine it, equity will not proceed till thoſe points are ſettled at law. *Hil.* 34 *G.* 3. *Bouſher* v. *Morgan*, 3 *Anſtr.* 404.

Vide *Faits.* (T. a)

14 Vin. 160. (S. a) Relief in Equity, in reſpect of the *Conſideration*.

1. THE court will not ſet aſide an agreement for an annuity, though the annuity was ſold too cheap, if there is no impoſition. 1743. *Floyer* v. *Sir Brownlow Sherrard*, *Amb.* 18.

2. A conveyance, for *conſideration*, not to be ſet up as a gift, and where it was for a *fictitious* conſideration inſerted by the grantor himſelf though found to be a gift by a jury, it was ſet aſide in equity. *July* 9th, 1755. *Bridgman* v. *Green*, 2 *Veſ.* 627.

3. Grant of a reverſionary rent charge after the death of plaintiff's father, who was old and infirm, upon unreaſonable terms ſet aſide, but to remain as a ſecurity for the money really advanced, and coſts to be paid as in redeeming a mortgage. 18 *G.* 3. 1778. *Gwynne* v. *Heaton and others*, 1 *Bro.* 1.

4. A deed entered into by parties apprized of their rights, in order to put an end to a ſuit, although upon *inadequate* conſiderations, ſhall not be ſet aſide. *Mich.* 19 *G.* 3. 1778. *Stephens* v. *Lord Viſcount Bateman*, 1 *Bro.* 22.

5. Leaſes for lives obtained by *agents* of a deceaſed perſon having been of weak intellects, and upon inadequate conſiderations, ſet aſide. *July* 1783, *Gartſide* v. *Iſherwood*, 1 *Bro.* 558.

6. Bill to ſet aſide an agreement for an annuity (which had been paid) during the uncle's life time, in conſideration of a ſum payable at his death, *ſans iſſue*, diſmiſſed. *Hil.* 1786. *Henley* v. *Acton*, 2 *Bro.* 17.

7. An

7. An annuity purchaſed for *four years purchaſe*, on a life of 30, ſubject ſlightly to the gout, ſet aſide for inadequacy of conſideration. *Eaſt*, 1787. *Heathcote* v. *Paignon*, 2 *Bro.* 167.

8. A *truſtee* for the ſale of eſtates, for payment of debts, purchaſed them himſelf by taking advantage of the confidence repoſed in him, and, previous to the completion of the contract, ſold them at a *highly advanced* price; he was decreed a truſtee for the ſums produced by the ſecond ſale, for the original vendor. 11th *December* 1788. *Fox* v. *Mackreth*, 2 *Bro* 400.

For more of this title, ſee Supplement, tit. *Covenants*, *Deeds*, *Faits*, and *Warrants*.

Guardian and Ward. [F]

(N. 3) *Who* may be *appointed* Guardian, and by whom, and what ſhall be ſaid an Appointment within the 12 *Car.* 2. *c.* 24. 14 Vin. 172.

1. A Preſbyterian, who had three infant daughters bred up that way, and had three brothers preſbyterians, makes his will and appoints his brothers and a clergyman of the church of *England* guardians to the three infant daughters, and dies, having ſent his eldeſt daughter to his next brother; the clergyman gets the two other daughters into his cuſtody, and places them at a boarding-ſchool where they are bred according to the church of *England*; and brought his bill to have the eldeſt daughter placed out with her two ſiſters. The teſtator's three brothers brought their bill to have the two daughters delivered to them, offering *parol evidence* that the teſtator directed and intended to have his children brought up preſbyterians; but the court declared that no proof ought to be admitted in the caſe of the deviſe of a guardianſhip, any more than in caſe of a deviſe of land. *Trin.* 1730. *Storke* v. *Storke*, 3 *P. W.* 51.

2. The mother's appointment of a guardian to her ſon by will is void, the ſtatute confining the power of appointment of a teſtamentary guardian to the father only. *June* 18, 1747. *Ex parte Edwards*, 3 *Atk.* 519.

3. A direction in a will, that the wife ſhould have the education of the children, *may* amount to a guardianſhip. *Per Hardwicke, Chancellor, March* 1747-8. *Mendes* v. *Mendes*, 1 *Veſ.* 91.

4. On a deviſe of a guardianſhip, the court admitted *parol* evidence to ſhew the father's intention as to the education of his children. *November* 1750. *Anon.* 2 *Veſ.* 57.

5. A grandfather cannot appoint guardians of his grandſon, but he may give his eſtate on what condition he pleaſes, and the father ſubmitting is bound by it. 3d *April* 1756. *Blake* v. *Leigh*, *Amb.* 306.

6. There is no decided caſe that guardians can be appointed for a child (by a ſtranger), during the life of the parent; but the court will take care that the child ſhall be educated according to his expectations. 1789. *Powel* v. *Cleaver*, 2 *Bro.* 499. *Ex parte Warner*, 4 *Bro.* 102. S. P.

14 Vin. 175. (N. 5) What the Infant may do without a Guardian.

1. AN infant may bind himſelf in this court by a marriage contract, eſpecially if the wife accepts pin-money, or after the huſband's death accepts her jointure under that contract. *Smith* v. *Low*, 1 *Atk.* 489. *June* 1739.

2. If an infant, who contracted a debt during his minority, confirms it after he comes of age, it will bind him, though it was voidable at his election. *Smith* v. *French*, 2 *Atk.* 245. *February* 1741.

3. Where an agreement appears upon the face of it to be prejudicial to an infant, it is void; but if for his advantage, then voidable only. *Harvey* v. *Aſhley*, 3 *Atk.* 610. *March* 1748.

4. An infant may execute a power, where he is a mere inſtrument only. *Hearle* v. *Greenbank*, 3 *Atk.* 710. *May* 1749.

5. He may preſent to a church; and, *as it is ſaid*, he may declare the uſes of a fine or recovery, where he ſuffers it without a privy ſeal; and the uſe is good, and the fine and recovery ſhall ſtand. *Ibid.*

6. But an infant cannot diſpoſe of his real eſtate. *Ibid.* 712.

14 Vin. 175. (N. 6) *Aſſigned* or appointed *by the Court*; who may be, and in what Caſes.

1. WHERE a father, by his will, names guardians to his natural children, the court will appoint them guardians, without reference to the maſter. *April* 28, 1789. *Ward* v. *St. Paul*, 2 *Bro.* 583.

2. The court refuſed to appoint a partnerſhip guardians. 1799. *De Mazar* v. *Pybus*, 4 *Veſ. jun.* 649.

14 Vin. 173. (N. 7) Aſſigned or admitted; how.

1. PER Lord *Hardwicke*. There may be an application to the court in the caſe of a *guardianſhip of children*, though there be no cauſe depending, and a *teſtamentary guardianſhip* is not aſſignable. *Mich.* 1737. *Molliſh* v. *De Coſta*, 2 *Atk.* 14.

2. A guardian may be appointed, though no cauſe depending. *November* 1754. *Ex parte Birchell*, 3 *Atk.* 813.

3. Petition that a guardian may be aſſigned, unleſs to carry on a ſuit or protect an intereſt, muſt be purſuant to the ſtatute. 1783. *Ex parte Becher*, 1 *Bro.* 556.

(O) Guardian in Socage; who ſhall be Guardian. 14 Vin. 177.

AN infant, where there is no teſtamentary guardian or mother, having ſocage land, may chuſe a guardian at 14 if a female, at 14 if a male. *July* 1751. *Anon.* 2 *Veſ.* 374.

(O. 2) Guardian removed. 14 Vin. 179.

1. A Guardianſhip of an infant, notwithſtanding he marries, does not determine till 21. *Mendes* v. *Mendes*, 3 *Atk.* 625. *March* 1747.

2. Two young ladies petitioned to be taken out of the cuſtody of their mother, who had been appointed guardian of them by the court, upon affidavits of her putting them to ſeparate ſchools, and endeavouring to marry the younger to one *Sparry*. A *Frenchman* of the name of *Quan*, whoſe father had the care of the two infants at *Paris*, married the eldeſt when ſhe was 11 years of age only; he petitioned for a decree of cohabitation, and to have ſome of her money paid him. And the mother petitioned for a reimburſement of her expences in bringing them over. The court refuſed to remove the guardian, but made orders regulating her conduct, and placed the infants in the care of another perſon, and allowed the mother a liberal maintenance to reimburſe her the expences which ſhe claimed; and refuſed the petition of *Quan* entirely. *Nov.* 1748. *Moach* v. *Garvan*, 1 *Veſ.* 158.

3. A guardian will not be appointed after marriage, nor diſcharged becauſe of a marriage. *Ibid.*

4. On the application of an infant, and by conſent of his relations and the guardians, other perſons were appointed to have the care of him till further order. And the court ſaid, that though it was reaſonable to do ſo in this caſe, yet in general it ought not to be done; and if guardians had taken the truſt upon themſelves, the court in general would compel them to act. *May* 1752, *Spencer* v. *Earl of Cheſterfield*, *Amb.* 146.

(P. 2) Guardian in Socage removed. 14 Vin. 180.

Vide (O. 2)

14 Vin. 181. (P. 3) Power of the Guardian over the Eſtate of the Infant.

1. A Guardian cannot change the nature of the eſtate, by turning money into land, nor a leaſe for years into a freehold. *Hil.* 1730. *Witter* v. *Witter*, 3 *P. W.* 100.

2. *A.*, who had a biſhop's leaſe to her and her heirs during three lives, deviſes the ſame to her daughter, an infant, and directs the guardians and truſtees to make purchaſes for the infant's benefit. The guardian, upon the deceaſe of one of the three lives, took a new leaſe for three new lives. The infant dies, the leaſe ſhall go to the heirs *ex parte paternâ*; for the new leaſe is to be conſidered as a new acquiſition, and to veſt in the infant as a purchaſe. The reaſon why an infant's perſonal eſtate turned into real is ſtill conſidered as perſonal is on account of the different ages at which an infant can diſpoſe of his perſonal and his real, and not in favour of one repreſentative more than another. *July* 1739. *Pierſon* v. *Shore*, 1 *Atk.* 480.

3. The act of a guardian, where a *reaſonable* one, will bind the infant, and will have the ſame conſequences as if done at full age, otherwiſe if wantonly done by the guardian without any real benefit to the infant. *Ibid.*

4. *Richard Lloyd* deviſed ſome land and houſes built thereon to his ſix children; the mother acting as *guardian* to the children, who were all infants, demiſed the premiſes for 41 years; the eldeſt ſon joined in the leaſe, and covenanted that the reſt of the children, when of age, ſhould confirm it. They all attained 21, and accepted the rent for above 10 years after the youngeſt came of age. The court eſtabliſhed the leaſe for the reſidue of the term. *Smith* v. *Low*, 1 *Atk.* 489. *June* 1739.

5. Where a perſon of age when he makes a leaſe, and has nothing in the premiſes, but they afterwards deſcend to him, the leaſe ſhall enure by way of eſtoppel, otherwiſe if he were an infant. *Ibid.*

6. Where there is an application to the court to lay out part of an infant's perſonal eſtate in land, if he dies, or does not approve when of age, the property will not alter. *Sergeſon* v. *Sealey*, 2 *Atk.* 413. *October* 1742.

7. Where an infant is under guardianſhip, his real eſtate ought to be taken care of, and applied according to the nature of it; and the court will take care it ſhall be ſo, and will not ſuffer his real property to be changed into perſonal during his infancy, or his perſonal into real; in order that the perſons, who are to come into ſucceſſion, may find the property in the ſame ſtate, and without being altered by thoſe who had no power to alter it. *May* 1750. *Rook* v. *Warth*, 1 *Veſ.* 461.

(P. 4) Power as to the Perſon of the Infant; and in what Caſes the Court will deliver the Infant to the proper Guardians; and how far reſtrained by Chancery. 14 Vin. 183.

1. A Rich uncle takes his niece into his houſe, maintains her there, and dies, having left her 10,000*l.*; the executor continues to keep the niece in the houſe, where he and the teſtator lived. The father of the child petitions, that ſhe may be delivered to him. The child (of the age of 13) appears in court, and being examined, denies that ſhe is under any reſtraint. The court of opinion that the guardianſhip of the child does by the law of nature belong to the father, but that the right thereto is not to be determined without a bill; that the father may take his child, but not by force, nor in her going to or returning from court; and that the father at all reaſonable times may have acceſs to the child. *Mich.* 1732. *Ex parte Hopkins*, 3 *P. Wms.* 152.

Quere whether a writ of rewſtment of ward will lie, unleſs the defendant in the action takes away the ward? And as to a homine replegiando and habeas corpus, (which laſt eſpecially ſeems calculated only for the liberty of the ſubject;) if the parties brought up thereon will acquaint the court, that they are under no force, the court will let them go back to the places from whence they came; or if they appear to be under reſtraint, will ſet them at liberty, but not deliver them to the cuſtody of another, nor in a proceeding of that nature, determine private rights as a right of guardianſhip evidently is; for then the parties would be precluded from any appeal or writ of error thereon. Poſſibly in an action de ejectione cuſtodiæ the very right of guardianſhip might properly come in queſtion. *Rex v Smith*, B. R. Trin. 7 & 8 *Geo.* 2. in notis.

2. Children have a natural right to the care of their mother; and Lord *Hardwicke* ordered the grandfather, who was a defendant in the cauſe, to deliver them up to the mother, who was the plaintiff's wife. *Mich.* 1737. *Melliſh* v. *De Coſta*, 2 *Atk.* 15.

3. A guardianſhip of an infant, notwithſtanding he marries, does not determine till his age of 21. *March* 1747. *Mendes* v. *Mendes*, 3 *Atk.* 619.

4. Application to compel a ward to return to ſchool. The court ſaid that the guardian is the proper judge at what ſchool to place his ward; and the court will not indulge the infant in being put to a private tutor, or going to another ſchool; and if he refuſe to go, will take a proper courſe to compel him. As where a young man, having been placed at the univerſity, abſented himſelf and refuſed to return, Lord *Macclesfield* ſent him back in the cuſtody of his own tipſtaff. *July* 31, 1749. *Hall* v. *Hall*, 3 *Atk.* 721.

5. The guardianſhip of daughters determines by marriage, but not that of the ſons. *March* 1747-8. *Mendes* v. *Mendes*, 1 *Veſ.* 91. 160.

6. On a queſtion with whom a female infant of 17 years of age ſhould reſide, the court paid ſome attention to her inclination, the teſtamentary guardian having renounced, though the Chancellor, Lord *Hardwicke*, ſaid he ſhould have laid no weight on the deſire of a ſcholar. An infant, where there is no teſtamentary guar-

dian or mother, having ſocage land, may chuſe a guardian at 12 if a female, at 14 if a male, and it is frequently done upon the circuit. *July* 27, 1751. *Amb.* 2 *Veſ.* 374.

7. Upon petition by a father, who had been lately converted to the proteſtant religion, to have the guardianſhip of his ſon, which by his conſent had been repoſed in another perſon, upon attendance of all parties before the maſter in a cauſe inſtituted by the father and the ſon to eſtabliſh the will of the grandfather, by which he had *deviſed* the guardianſhip to ſtrangers, who refuſed to act: The court ſaid, that there was no law to take a guardianſhip from papiſts; but the court could refuſe to appoint them. Whereupon Sir *Cordell Firebrace* and Sir *Robert Ladbroke*, by conſent, were appointed guardians, and the infant, whoſe relations were papiſts, was put to *Harrow* ſchool; and it was ordered that none but proteſtants ſhould have acceſs to him; but the mother, who was a papiſt, was to ſee, and correſpond with him under reſtrictions. 3d *April*, 1756. *Blake* v. *Leigh*, *Amb.* 308.

14 Vin. 186. (Q. 3) Allowances. What Allowances he ſhall have.

1. THE allowance to be made for maintenance to a guardian muſt have regard to what the infant then had, and not to what may fall in afterwards, and till the contingency happens, ſhall not exceed the income of his original portion. *Trin.* 1735. *Chaplin* v. *Chaplin*, 3 *P. Wms.* 368.

2. The court, upon *ex parte* applications, may allow maintenance for infants, where no cauſe is depending. It is at the peril of the guardian in ſocage what he applies for maintenance; and *the court ſaid*, the convenience in theſe applications is, the inducement to perſons of worth to accept of the guardianſhip, in which caſe they have the ſanction of the court for every thing they do on account of maintenance. *June* 1742. *Ex parte Whitfield*, 2 *Atk.* 315.

3. There being a borrowing and lending in the caſe of a mortgage, the real eſtate is conſidered only as a pledge, and the perſonal liable in the firſt place; but this rule has never been carried ſo far as to extend it to a proviſion in a ſettlement charged on real eſtates for maintenance for a child during her minority. *November* 1744. *Laney* v. *Duke and Ducheſs of Athol*, 2 *Atk.* 444.

4. In the caſe of an elder brother, the court will direct the maſter to make a larger proviſion for him, that he may be able, as the head of the family, to maintain younger brothers and ſiſters. *Ibid.*

5. The court will not direct intereſt for a contingent legacy, to be applied for the child's maintenance, unleſs from the poverty of the parent he is in danger of periſhing for want. A parent muſt maintain his child, unleſs totally incapable, or by having many children, borders on neceſſity. *June* 1743. *Butler* v. *Freeman*, 3 *Atk.* 60.

6. In

6. In the case of a child, let a testator give a legacy how he will, either at 21 or marriage, or payable at 21 or marriage, and the child has no other provision, the court will give interest by way of maintenance. *July* 9, 1744. *Heath* v. *Perry*, 3 *Atk.* 102. 716.

7. Where maintenance is allowed, it is always paid to the father out of the child's estate; and there is no instance of its being deducted out of a legacy left by a father to the child. *Trin.* 16 *G.* 2. *Jefferies* v. *Jefferies*, 3 *Atk.* 123.

8. A grandfather is not bound to maintain a grandchild. *Roome* v. *Roome*, 3 *Atk.* 181.

9. Upon an application for maintenance for an eldest son, the court will make him a liberal allowance to enable him to maintain his brothers and sisters. *May* 1747. *Petre* v. *Petre*, 3 *Atk.* 511.

10. A father by will appoints his wife guardian of his eldest son till 21; a petition on the mother's behalf to confirm her guardian, and to be justified in what she should expend for maintenance. No instance where there is *a testamentary* guardian of the court's confirming it in this summary way, or sending it to a master to ascertain the allowance for the infant's maintenance: a bill is necessary for this purpose. *June* 1747. *Ex parte Richards*, 3 *Atk.* 518.

11. A guardian, before he had passed his accounts, brought an action against an infant for board; the court continued the injunction, which was prayed by the infant's bill, till the hearing, and said, in taking the account, the court would allow the guardian *according to the maintenance allotted to the infant*, to which the jury would have no regard. *March* 1747. *Anon.* 3 *Atk.* 618.

12. Where legacies are given, payable at a certain time, they carry no interest, for, till the day of payment comes, it is not demandable; but if given to a child, the court will allow it by way of maintenance. *May* 1749. *Hearle* v. *Greenbank*, 3 *Atk.* 695.

13. Where it *appears* that a guardian or a father is in distressed circumstances, the court will make a liberal allowance to infants. *Nov.* 1748. *Moach* v. *Garvan*, 1 *Ves.* 160.

14. Testator, by his will, gave maintenance to his second son out of his real estate; he afterwards gives large legacies to his younger children, with maintenances out of the interest, the second son is intitled to both. 1782. *Clive* v. *Walsh*, 1 *Bro.* 146.

15. Motion for an increase of allowance to an eldest son, and for a *special* direction to the master to consider the birth of a posthumous son; but the latter part of the motion was refused. 1782. *Burnet* v. *Burnet*, 1 *Bro.* 179.

16. A second husband is not bound to maintain the children of the first, but shall have an allowance from the income of their fortunes. 1783. *Billingsley* v. *Critchet*, 1 *Bro.* 268.

17. Maintenance not allowed by the court, where the parent is of ability to maintain his children, although directed by the will; and where he is reported not of ability, the sums allowed

shall be only from the time of the report, not of the decree. 1784. *Hughes* v. *Hughes*, 1 *Bro.* 387.

18. No allowance made to a parent for maintenance of the child for time past. *July* 1787. *Hill* v. *Chapman*, 2 *Bro.* 231.

19. On very *particular* circumstances the court will give maintenance for the time previous to the report. 1790. *Andrews* v. *Partington*, 3 *Bro.* 60.

20. The court will grant maintenance, though no cause in court. 1790. *Ex parte Rent*, 3 *Bro.* 80.

21. A guardian may be appointed and maintenance allowed without suit upon petition, and the costs allowed him in his accounts. *March* 1792. *Ex parte Slater*, 3 *Bro.* 500, *and the Cases there cited.*

22. No maintenance allowed where the parent is of ability to maintain his child. 1792. *Pulsford* v. *Hunter*, 3 *Bro.* 417.

23. Where there was no gift of the interest to legatees, and the testator has directed the money to be remitted in a way that he knew made interest, there is a very good ground for contending that they being infants are entitled to maintenance only. 1799. *De Manneville* v. *Pybus*, 4 *Ves. jun.* 648.

14 Vin. 387.

(Q. 4) Guardian charged or favoured.

Vide (C. a)

14 Vin. 501.

(B. a. 2) *Actions.* Proceedings in Actions or Suits by or against Infants suing or defending by Guardian, &c.

Where a defendant puts in an answer to a bill brought by an infant,

1. AN infant's answer cannot be given in evidence against him, because it is not the infant's answer but the guardian's, and the guardian is sworn and not the infant. *Hil.* 1733. *Wrottesley* v. *Bendish*, 3 *P. Wms.* 237.

who does not reply to it, in such case it seems the answer must be taken to be true, in regard the defendant, for want of a replication, is deprived of an opportunity of examining witnesses to prove his answer; and he ought not to suffer for such neglect of the plaintiff—dubitatur. Sed quære.

2. A person who married a ward of the court *clandestinely* was restrained from proceeding in the ecclesiastical court on an excommunication against the infant or his guardian. *Dec.* 1737. *Hill* v. *Turner*, 1 *Atk.* 517.

3. Though a ward of the court be married with the consent of friends, there must be application in Chancery for increase of maintenance, and not in the ecclesiastical court. *Ibid.*

4. Where a mother secretes her children, who are infants, service of the subpœna upon her is sufficient, as she is the natural guardian of her children. *Nov.* 1744. *Smith* v. *Marshall*, 2 *Atk.* 70.

5. If

5. If an infant plaintiff does not reply to the answer, he is not affected by it, as he cannot admit any thing. *July* 1742. *Legard* v. *Sheffield*, 2 *Atk.* 377.

6. It was doubted by Lord *Hardwicke*, Chancellor, whether an infant, before he comes of age, can put in a new answer. *Bennet* v. *Lee*, 2 *Atk.* 487. *Dec.* 1742.

7. But afterwards he may, and make a new defence. *March* 1743. *Ex parte Bennet*, 2 *Atk.* 531.

8. Where an infant brings a bill for land, and to have an account of the mesne profits, the court may elect him to proceed at law, and retain the bill for the mesne profits. *April* 1744. *Dormer* v. *Fortescue*, 3 *Atk.* 130.

9. Where a guardian has been guilty of ill practices in the prosecution of a suit to obtain a verdict, though it was not the act of the infant himself, yet the ill practice may be given in evidence. *July* 1747. *Caverly* v. *Dudley*, 3 *Atk.* 544.

10. An infant plaintiff is bound by a decree. *March* 1747. *Gregory* v. *Molesworth*, 3 *Atk.* 626.

11. An infant, after being of age, is not allowed by a new bill to dispute any thing that was done during his minority about maintenance. *March* 1747. *Gregory* v. *Molesworth*, 3 *Atk.* 627.

12. Money in the funds belonging to wards of the court, cannot be transferred into the name of the Accountant-General to the credit of the cause, until the account is taken before a Master, and his report made. *Hil.* 1779. *Bencroft* v. *Rich*, 1 *Bro.* 56.

13. An infant ought to sue by his next friend, and not to stay till he comes of age. *June* 1790. *Blake* v. *Bunbury*, 1 *Ves. jun.* 194.

14. Infancy in the defendant is no excuse for the plaintiff's delay. 1792. 2 *Ves. jun.* 12.

15. An infant may be foreclosed. A decree may be had against him. He can do nothing but shew error. *Bishop of Winchester* v. *Beaver*, 3 *Ves. jun.* 317. 1797.

16. Copyhold lands were mortgaged in fee by lease and release as freehold; the customary heir is bound by a covenant for further assurance; but during the infancy the court refused to foreclose, and would go no further than direct the account, and that in default of payment the plaintiff should be let into possession, and hold and enjoy, till the heir should attain twenty-one, at which time he should surrender, and a day was given to shew cause against the decree. *Spencer* v. *Boys*, 4 *Ves. jun.* 370.

17. A motion for leave to answer by guardian must name the guardian. *Brassington* v. *Brassington*, 2 *Anstr.* 369. *Mich.* 34 *G.* 2.

14 Vin. 202. (C. a) Reſtrained and puniſhed in Equity.

1. WHERE any perſon enters upon an infant's eſtate, and continues the poſſeſſion, this court conſiders him as a guardian, and will decree an account; and to be carried on after the infancy is determined, unleſs the infant, after being of age, waived ſuch account. *Hil.* 1737. *Morgan* v. *Morgan*, 1 *Atk.* 489.

2. But the court will not appoint a receiver of an infant's eſtate without bill. *Anon. Ibid.*

3. It is improper for a guardian to purchaſe an infant's eſtate *immediately* upon his coming of age; but if the guardian pay the full conſideration, it is not voluntary, and cannot be ſet aſide. *Oldin* v. *Samborne*, 2 *Atk.* 15. *Mich.* 1737.

4. Whoever enters on the eſtate of an infant, enters as guardian. *April* 1744. *Dormer* v. *Forteſcue*, 3 *Atk.* 144.

5. The procuring releaſes from a perſon *immediately* after his coming of age, ſuſpicious; but if no *fraud*, and the accounts ſettled at the time, they will not be ſet aſide. *Steadman* v. *Palling*, 3 *Atk.* 424. *Feb.* 1746.

6. Where a guardian, on ſettling his accounts as ſoon as the infant came of age, accepted a preſent from the infant, the court ſet it aſide, as dangerous. *April* 1715. *Oldham* v. *Hand*, 2 *Veſ.* 259.

7. The court may give extra-judicial directions on behalf of infants; as where a ſtranger complained to the court of the guardian, and abuſe of the infant's eſtate, the court, upon the ſtranger's undertaking to pay coſts, referred the receiver's accounts to the Maſter, to ſee whether the infant was wronged or not. *July* 1752. *Earl of Pomfret* v. *Lord Windſor*, 2 *Veſ.* 484.

14 Vin. 202. (D. a) *Offences by Strangers*, with regard to the Ward. How *puniſhed*, and in what Caſes.

1. MARRYING an infant ward of the court is a contempt, though the parties concerned in ſuch marriage had no notice that the infant was a ward of the court; for acts of the court, as the commitment of a wardſhip, and in a cauſe depending, are to be taken notice of by every one at his peril. *Trin.* 1731. *Herbert's* caſe, 3 *P. Wms.* 117, 118.

One not a freeman of London, *married a city orphan, and though it did not appear that he had any notice of her being a city orphan, yet held ſuch perſon was puniſhable by the court of orphans.* 3 *Lev.* 32. 1 *Vent.* 178. *Rex* v. *Harwood. Note to the above caſe.*

2. The perſon who gave away an infant a ward of court at her marriage, was committed: and it was ſaid *per* Lord *Hardwicke* Ch. that to make perſons liable for contempt of court, for being concerned in marrying one of its wards, ſuch perſon muſt be concerned

concerned in the original contrivance, and be *apprised* of her being a ward of court. *More* v. *More*, 2 *Atk.* 157. *April* 1741.

3. A mother petitioned, that Mr. *Barry* might be reſtrained from marrying her daughter, being an infant, and a ward of this court; his lordſhip ordered, as Mr. *Barry* was likewiſe an infant, that his guardian ſhould not permit him to marry the young lady without leave of the court. *March* 1745. *Smith* v. *Smith*, 3 *Atk.* 304.

4. It is a contempt to marry a ward of the court without leave, though the father of the infant be living, or there be a teſtamentary guardian. The mere filing a bill is ſufficient to make an infant a ward of court. *April* 1756. *Butler* v. *Freeman*, *Amb.* 301.

5. The perſonal attendance of a man who ran off with a *ward of the court*, was diſpenſed with, he being in the army, and offering to go before the maſter and make a ſettlement. *March* 1763. *Green* v. *Pritzler*, *Amb.* 602.

6. There muſt be a reference to a Maſter for a *proper* ſettlement, before a contempt for marrying a ward of court can be cleared: in ſuch caſe, a ſettlement of the wife's perſonal property upon huſband for life, then to wife for life, then to children according to appointment of ſurvivor, varied, ſo as to veſt a moiety in the children at her death, if before his, but ſtill ſubject to his appointment. *June* 1790. *Stevens* v. *Savage*, 1 *Veſ. jun.* 154.

7. Huſband committed for marrying a ward of court, and diſcharged under particular circumſtances on undertaking to make a ſettlement, was held to that, and not permitted, *upon her conſent*, to receive her whole fortune. 1796. *Stackpole* v. *Beaumont*, 3 *Veſ. jun.* 89.

8. A huſband is entitled to the income of his wife's equitable intereſt, unleſs he has received ſome fortune with her; or has miſbehaved, as by running away with a ward of the court. 1798. *Macauley* v. *Philips*, 4 *Veſ. jun.* 15.

9. Upon a propoſal for a ſettlement, under a commitment for marrying a ward of the court, a power was directed to be inſerted, enabling the wife to ſettle the intereſt of a moiety of her fortune upon any future huſband for life. The huſband, undertaking by his counſel to execute ſuch ſettlement, was diſcharged. 1798. *Winch* v. *James*, 4 *Veſ. jun.* 386.

[D] 24 Vin. 205.

Guernsey, Jersey, and the Isle of Man.

1. THE *Isle of Man* is not part of the realm of *England*, but parcel of the king's crown of *England*, held as a feudatory dominion, by liege homage of the kings of *England*. *Earl of Derby* v. *Duke of Athol*. T. 1751, 2 *Ves.* 337.

2. A question, relating to the right and title to the *Isle of Man*, may be determined in *England*, in chancery, the king's bench, or before the king in council. *Earl of Derby* v. *Duke of Athol*. Hil. 1748. 1 *Ves.* 202.

3. By letters patent 7 *J.* 1. a grant was made by the crown of the *Isle of Man*, and of all the rectories and tithes, by name, to *William* Earl of *Derby* for life, to his wife for life, to their son *James* Lord *Stanley* in fee, to be held of the king by liege homage, rendering immediately after that homage two falcons, and so to his successors every coronation-day two falcons: this is a socage tenure, and (*semb.*) petty serjeanty. *Earl of Derby* v. *Duke of Athol*. T. 1751. 2 *Ves.* 337.

4. By private act of parliament, 7 *J.* 1. *William* Earl of *Derby*, and his wife for life, and the longest liver; then their son *James*, and the heirs male of his body; then *Robert Stanley*, and the heirs male of his body; then the heirs male of the body of Earl *William*; then the right heirs of *James* Lord *Stanley*; shall hold against the king, &c. and against the widow and daughters of Earl *Ferdinando* (Earl *William*'s elder brother), all the *Isle of Man*, with the appurtenances; and neither *James*, nor the heirs male of his body, nor *Robert*, nor the heirs male of his body, nor any of the heirs male of *William*, shall have power to alien it, but it shall continue as above limited; only they may make leases, as tenants in tail do in *England* by stat. *H.* 8.

5. In 1666, *Charles* Earl of *Derby* makes a lease for 10,000 years of the rectories and tithes in *Man*, for the benefit of the poor clergy; and by deed, as collateral security, conveys lands in *Lancashire*, in trust, to permit him and his heirs to hold said lands and receive the rents, till interruption in receipt of the rectories and tithes by him, or those claiming under him or his ancestors, and then to enter and receive.

6. In 1735, *James* Earl of *Derby* (heir male of *James* Lord *Stanley*, in the grant and act mentioned) devises to Sir *Edward Stanley* (who, on his death, became Earl of *Derby*, and his heirs for ever) all his honours, real estate, and hereditaments, whatsoever and wheresoever.

7. In

7. In this *James* ended the male line of Earl *William*.

8. The deviſe in 1735 was void, by force of the private act of parliament, whereupon the *Iſle of Man* deſcended to *James* Duke of *Athol*, as right heir of *James* Lord *Stanley* (afterwards Earl of *Derby*, beheaded at *Bolton* in *Lancaſhire* in 1651), being his great grandſon by *Charlotte* his third daughter.

9. The leaſe of the rectories and tithes was alſo void, and the truſtees were entitled to the rents of the lands in *Lancaſhire*, from the time the tithes were evicted by the Duke of *Athol*. *Earl of Derby* v. *Duke of Athol*. *T.* 1751. 2 *Veſ.* 337.

10. By ſtat. 5 *G.* 3. *c.* 26. in conſideration of 70,000*l.* to the Duke and Ducheſs of *Athol*, the iſland, caſtle, pele, and lordſhip of *Man*, and all royalties, *&c.* are unalienable in his majeſty; except the land-property rights, as lord of manors, patronage of biſhopric, *&c.*

11. By ſtat. 5 *G.* 3. *c.* 30. bounties on corn exported from *Britain* or *Ireland* to *Man*, are diſcontinued.

12. Stat. 5 *G.* 3. *c.* 39. provides againſt ſmuggling with the *Iſle of Man*.

13. Stat. 5 *G.* 3. *c.* 43. permits importation of ſeveral commodities of *Man*, and grants bounties on linens made in *Man*, and exported from *Britain*.

14. Stat. 6 *G.* 3. *c.* 50. extends the act 29 *Car.* 2., relating to taking affidavits in the country, to the *Iſle of Man*, and empowers the king to appoint ports therein for landing and ſhipping goods.

15. Stat. 7 *G.* 3. *c.* 45. encourages and regulates the trade and manufactures of *Man*.

16. Stat. 11 *G.* 3. *c.* 52. provides for repairing the harbours in *Man*.

17. Stat. 12 *G.* 3. *c.* 58. is for encouraging the herring fiſhery of *Man*.

18. The royal court of *Jerſey* cannot tranſmit a cauſe to the king for difficulty, but muſt proceed to judgment. *Mageons* v. *Dumareſque*, 2 *Ld. Raym.* 1448.

19. By 9 *G.* 3. *c.* 28. *Jerſey* and *Guernſey* may export to *America*, directly, goods neceſſary for the fiſhery; and import non-enumerated goods, except rum.

Heir Looms.

[D]
14 Vin. 291.

S. T. deviſed all his books, pictures, and houſehold goods to ſuch male perſon when he ſhould attain 21, who ſhould then be entitled to the truſt or poſſeſſion of his real eſtates before deviſed, and till then directed they ſhould be kept at *Dunton Hall*, and be uſed in the mean time by ſuch male perſon reſiding there, declaring

declaring it to be his will and desire that they might go in the nature of heir looms with his estate, and be used therewith, as long as the laws of this realm would permit. Decreed by Lord C. *Hardwicke* that the testator's pictures, books, and household goods ought to be considered as heir looms and to go along with his real estate, as far as by the rules of law or equity they may, for the devise here is a disposition only of the use, until some person, entitled to the inheritance, shall come into possession by attaining 21. *Trafford* v. *Trafford*, 3 *Atk.* 347. See *Toller's Law of Executors*, 151.

[D]
24 Vin. 293.

Hereditament.

See *Doe* v. *Richards*, stated in Suppl. tit. *Devise*, (S. a), *ante*.

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24 Vin. 294.

Heriot.

24 Vin. 296.

(A. 4) Payable. In what Cases. By Custom.

A Custom for the homage to assess a compensation in lieu of a heriot, to be paid by an incoming tenant on surrender or alienation, seems not to be good. *Per Buller & Heath* J. *Dub. Eyre* C. J. *& Rooke* J. *Parkin* v. *Radcliffe*, 1 *Bos. & Pull.* 282.

24 Vin 298.

(E) Remedy for them.

1. IF an heriot be reserved by deed since the stat. *Quia Emptores*, payable by tenant in fee, it will be considered as rent, and then the landlord cannot seize, but must either distrain or bring an action for non-payment. *Edwards* v. *Stanley*, *Willes' Rep.* 192.

2. Plaintiff declared for taking and distraining an ox. Defendant avowed the taking as a seizure for a heriot (claiming no right to distrain). On a question whether defendant, after a nonsuit, was entitled to double costs under 11 *G.* 2. Held not. The avowry not being for taking the ox as a distress is out of the statute; for heriot service, cattle, &c. are distrainable; for heriot custom, not. *Lloyd* v. *Winton*, *Barnes*, 198.

Holding over. [G]

(A) Holding over a Term, &c. 14 Vin. 304.

Vide *Viner*, tit. *Rent.* (G. c) and *Supplement*, ſame title.

Homine Replegiando. [G]

(C) Proceedings, Pleadings, and Returns; and in what Caſes the Party ſhall be bailed; and of the Difference between this Writ and a common Replevin. 14 Vin. 305.

1. AN *homine replegiando* being brought againſt the defendant for the wife of the plaintiff, an *alias* and *pluries* iſſued thereupon; to the laſt of which writs the defendant appeared; notwithſtanding that, a *capias in withernam* was iſſued againſt defendant, which was held to be irregular, and therefore all proceſs thereon was ſtayed.

The wife of the plaintiff having died after the defendant's appearance, it was moved, that all proceedings in this action be ſtayed. *Sed per Curiam*, "It is too much for us to ſtay this ſuit "upon a motion, and therefore let the plaintiff declare, and the "defendant may by pleading take what legal advantage he can." *Saunders* v. *Forteſcue*, *B. R. Mich.* 23 *G.* 2. 1 *Wilſ.* 256.

Honours. [D] 14 Vin. 319.

Vide *Peers*, *poſt*.

[D] 24 Vin. 319.

Hospitals.

See 2 Suppl. tit. *Charitable Uſe.*

[G]

Houſe of Correction.

24 Vin. 321.

(A) Erected how, and for what Purpoſes.

1. A Woman was committed by ſeveral juſtices of the peace, being taken on a general privy ſearch, and charged on oath to be a looſe, idle, and diſorderly perſon; and the commitment required her to be kept to hard labour till the firſt day of the next general quarter ſeſſions: and upon conſideration of all the ſtatutes relating to this matter, the commitment was held to be good, and the priſoner remanded. *Mary Freeman alias Talbot's Caſe. Mich.* 4 *G.* 2. *Stra. Rep.* 882.

2. By 15 *G.* 2. *c.* 24 it is enacted, "That in all caſes, where "any perſon, liable by law to be committed to the houſe of cor- "rection, ſhall be apprehended within any liberty, city, or town "corporate, whoſe inhabitants are contributory to the ſupport and "maintenance of the houſe or houſes of correction of the "county, riding, or diviſion in which ſuch liberty, city or town "corporate is ſituate, it ſhall and may be lawful for the juſtices "of the peace of ſuch liberty, *&c.* to commit ſuch perſon to the "houſe of correction of the county, *&c.*; and ſuch perſon ſhall "be dealt with in the ſame manner as if committed by any juſtice "of the peace for the ſaid county, *&c.*"

3. By 17 *G.* 2. *c.* 5. *ſ.* 31. it is enacted, "That the juſtices of "the peace for any county, riding, city, borough, town corporate, "diviſion, or liberty, at their general or quarter ſeſſions, ſhall from "time to time take effectual care that the houſes of correction "already provided, or hereafter to be provided, within the limits "of their reſpective juriſdictions, except ſuch houſes of correc- "tion as have been, or ſhall be erected or maintained by any "particular founder or founders, ſhall be duly fitted up, fur- "niſhed, and ſupplied with ſufficient implements, materials, and "furniture, for keeping, relieving, ſetting to work, employing,

"and

" and correcting all idle and diſorderly perſons, rogues, vaga-
" bonds, incorrigible rogues, and others who ſhall be ſent to,
" confined, or continued in the ſame; and two of the juſtices
" of the peace are required to viſit the ſame twice, or oftener, if
" need be, in every year, and to examine into the eſtate and
" management thereof, and to report the ſame to the next gene-
" ral or quarter ſeſſions, to the intent that if any thing be amiſs
" therein, the ſame may, by order of ſuch general or quarter ſeſ-
" ſions, be reformed and amended."

4. By *ſect.* 32. it is further enacted, " that where any of-
" fenders ſhall be committed to the houſe of correction, by vir-
" tue of any law now in being, or hereafter to be made, and
" the time and manner of their puniſhment is not expreſsly
" limited, directed, and appointed, the ſaid juſtices ſhall com-
" mit ſuch offender to the houſe of correction, there to be kept
" to hard labour, until the next general or quarter ſeſſions, or
" until diſcharged by due courſe of law; and it ſhall and may be
" lawful for two juſtices (of which the juſtice who committed
" ſuch offender to be one) to diſcharge the ſaid offender before the
" ſaid ſeſſions, if they ſee cauſe; and if he ſhall not be ſo diſ-
" charged, the ſaid ſeſſions may either diſcharge him, or con-
" tinue him in cuſtody for ſuch time as they ſhall ſee fit, not ex-
" ceeding three months."

5. By *ſect.* 33. it is enacted, that " the juſtices of the peace at
" the general or quarter ſeſſions, may and ſhall cauſe ſuch ſums
" of money as ſhall be neceſſary for all or any of the purpoſes in
" the ſaid act mentioned, to be raiſed in the ſame manner as rates
" are directed to be raiſed by an act made in the twelfth year of
" the reign of his preſent majeſty, intituled " *an act for the more*
" *eaſy aſſeſſing, collecting, and levying of county rates.*"

6. By 22 *Geo.* 3 *c.* 64. *ſ.* 1. it is enacted, " that the juſtices of
" the peace in every county, riding, diviſion, city, liberty, and
" precinct, within *England* and *Wales*, at their reſpective quar-
" ter ſeſſions of the peace to be held next after *Midſummer*, ſhall
" nominate one or more juſtice or juſtices of the peace within
" their reſpective juriſdictions, to examine and inſpect the ſeve-
" ral houſes of correction within their reſpective juriſdictions,
" and the juſtice or juſtices ſo to be nominated, is and are here-
" by required carefully and diligently to inſpect the ſame, and
" to report his or their opinion to the juſtices at the *Michaelmas*
" quarter ſeſſions then next following as to the ſtate and con-
" dition thereof, and the increaſe of number, or additions, or
" alterations which they may judge neceſſary to make them more
" convenient and uſeful; and the ſaid juſtice and juſtices is and
" are hereby required to employ proper and ſkilful perſons to
" make plans and eſtimates of new buildings, or the additions or
" alterations which he or they ſhall think neceſſary; which plans,
" together with the report, ſhall be laid before the court at the
" ſaid *Michaelmas* quarter ſeſſions; which court is hereby autho-
" riſed and required to conſider the ſame, and if they approve of
" ſuch

By 24 G. 3. ſeſſ. 2 *c.* 55. it is enacted, that juſtices who have omitted to inſpect into the ſtate of the houſes of correction and report the ſame, as directed by 22 G. 3. *c.* 64. *ſ.* 1. may do it at the next or any ſubſequent quarter ſeſſions of the peace.

"such plans, they may contract with such persons whom they "shall think most proper to do the same; or if they disapprove "such plans or estimates, to direct such others to be made as "they shall think fit; and the justices, in settling and adjusting "such plans, are hereby required to provide separate apartments "for all persons committed upon charges of felony, or convicted "of any theft or larceny, and committed to the house of correc- "tion for punishment by hard labour under or by virtue of the "laws in being, in order to prevent any communication between "them and the other prisoners, and also proper apartments, co- "vered or open as shall be found most convenient for employing "the several persons to be kept to hard labour; and they are "also to provide separate apartments in each division of the said "house of correction, for the women who shall be committed "thither."

7. By *sect.* 8. it is further enacted, "that no person who shall be "governor or keeper of any house of correction, or who shall have "any office or employment as assistant, or otherwise, under such "governor or keeper, shall sell, or be capable of being licensed to "sell, or have any benefit or advantage whatsoever, directly or "indirectly, from the sale of any wine, ale, beer, spirituous or "other liquors, or any other article, matter, or thing used in such "house of correction, or by any person or persons confined there- "in during the time of such employment:" under the penalty of ten pounds, and to be dismissed from his employment; and that "no wine, ale, spirituous or other liquors shall be brought "into the house of correction to be drank there, unless for a "medical purpose, by a written direction under the hand of "the apothecary or surgeon usually attending such house of "correction."

8. By 24 *Geo.* 3. *sess.* 2. *c.* 55. *s.* 2. it is enacted, "that where "it shall appear that the amount of any estimate approved by the "justices for the building, rebuilding, enlarging, or removing "and fitting up any house of correction, under the powers of "this act, shall exceed one half of the amount of the ordinary "annual assessment for the county rate, that then and in such "case it shall and may be lawful for the justices of the peace, "within the respective limits of their commissions, so assembled "in their quarter sessions, from time to time to borrow, and take "upon mortgage of the rates herein mentioned, any sums, not "less than fifty pounds, nor exceeding one hundred pounds "each."

And by *sect.* 3. the justices are authorised and required not only to charge the said rates, with the interest of the monies so borrowed, but also with the payment of a further sum, equal at least to the sum so charged for the interest of the securities mentioned in the said act.

By *sect.* 5. it is further enacted, "that in cases where such "houses of correction shall be pulled down, repaired, rebuilt, or "enlarged, it shall be lawful to and for the said justices, in their

"quarter

" quarter seſſions aſſembled, to ſell and diſpoſe of the materials " of ſuch old houſes of correction, or ſuch parts thereof, and " alſo of the whole, or ſuch parts of the ſcite or ground belong- " ing thereto, as ſhall not be neceſſary to be uſed for, or in the " rebuilding, repairing, or enlarging, ſuch houſes of correction, " at the beſt price or prices that can be gotten for the ſame; " which monies ſhall be applied to the purpoſes of this act; and " in caſe of any ſuch purchaſe of lands, tenements, or hereditа- " ments, which ſhall exceed what is neceſſary to be ſo uſed or " employed, the ſaid juſtices may ſell and diſpoſe of the ſame, " and apply the money to be raiſed by ſuch ſale for the purpoſes " aforeſaid."

By *ſect.* 12. it is further enacted, " that in all caſes where any juſ- " tice or juſtices of the peace is or are, or ſhall be, by any act of " parliament, authoriſed or empowered to convict any perſon be- " fore him or them in a ſummary way, without the intervention of " a jury, it ſhall be lawful for ſuch juſtice or juſtices of the peace, " if he or they ſhall think fit, to commit ſuch perſon ſo con- " victed to the houſe of correction within his or their juriſdic- " tion, in lieu or inſtead of the common jail."

Habeas Corpus. [G]

(C) What it is, and how granted, and by whom. 14 Vin. 211.

A *Habeas Corpus ad ſubjiciendum* muſt be awarded on motion, but a *habeas corpus ad ſatisfaciendum*, &c. is granted of courſe. *Penrice and Wynne's Caſe, E. T.* 30 *Car.* 2. *C. B.* 2 *Mod.* 306.

(C. 2) By what Court granted. 14 Vin. 211.

1. *C. B.* has a general juriſdiction to grant it in all caſes whatſo- ever. *Wood's Caſe. Hil.* 11 *G.* 3. *C. B.* 3 *Wilſ.* 172. *and* vide 2 *Bl. Rep.* 745.

2. In civil caſes, it is a judicial writ iſſuing out of the king's bench office. *Ballard* v. *Bennett, E.* 32 *G.* 2. *B. R.* 2 *Burr.* 777.

3. By 16 *Car.* 2. *c.* 10. If any perſon ſhall be committed by the privy council, either the court of king's bench or common pleas may grant a habeas corpus.

4. By 31 *Car.* 2. *c.* 2. either the court of king's bench or common pleas in *term time*, and any judge of the said courts or baron of the exchequer in *vacation*, may award a habeas corpus for any prisoner whatsoever.

24 Vin. 212.

(D) In what Cases.

1. IT will be granted for detaining a child under age from her father. 1 *Bl. Rep.* 386.

2. A man impressed under a press act, who is not in custody (either as having absconded, or as being promoted to be a corporal), cannot bring habeas corpus, but the court will, on motion, grant a rule to the commissioners for putting the act in execution, to shew cause why he should not be discharged. *Rex* v. *Dawes.* T. 31 *G.* 2. *B. R.* 1 *Burr.* 636.

3. The stat. 6 & 7 *W.* 3. *c.* 18. *s.* 19., which allows to the master of every ship, engaged in the coal trade, two seamen free from impressing, is still in force; and if the master nominate those seamen before the ship sail, and they are afterwards impressed, the court of *B. R.* will grant an habeas corpus to the officer impressing them, to bring them up that they may be discharged. *Ex parte Dryden.* M. 34 *G.* 3. 5 *T. R.* 417. *But* vide *ex parte Gallilee.* T. 38 *G.* 3. 7 *T. R.* 673., contrà.

4. For *a wife.* *Rex* v. *Mary Mead.* *E. T.* 31 *G.* 2. *B. R.* 1 *Burr.* 542. 4 *Ibid.* 1991.

5. For a *young lady* who had been decoyed from her father; but now desired to continue with him. *Rex* v. *Clarke.* T. 31 *G.* 2. *B. R.* *Ibid.* 606.

6. To the keeper of a private mad-house to bring up one confined therein. *Rex* v. *Clarke.* *M.* 3 *G.* 3. *B. R.* 3 *Burr.* 1362.

7. To produce an infant. *Rex* v. *Sir F. B. Delaval.* *Ib.* 1436.

8. The court of common pleas may grant a habeas corpus to bring up the body of a prisoner, committed by a justice of peace for refusing to give surety for his good behaviour, pursuant to the directions of a penal statute. *Jones's Case.* *Hil.* 28 & 29 *C.* 2. *C. B.* 1 *Mod.* 235.

24 Vin. 215.

(D. 3) Directed to whom, *ad faciendum.*

1. IT must be directed to the officer in whose custody the prisoner is detained. *Stat.* 31 *Car.* 2. 2.

2. And therefore if to the sheriff or gaoler it is bad. *Anon.* T. 12 *W.* 3. *B. R.* 1 *Salk.* 350.

(E. 2) To what Place. 14 Vin. 217.

1. TO the cinque-ports. *Anon. M.* 21 *C.* 2. *B. R.* 1 *Mod.* 20.

2. To the governor of *Jerſey* and *Guernſey*. 1 *Sid.* 386.

3. To every inferior court. 4 *Com. Dig. G.* 1.

(F) Returns. How and what. In general. 14 Vin. 217.

1. ON a habeas corpus granted by a judge in vacation, returnable immediate before himſelf at his chambers, the party may be brought into court in term. *Rex* v. *Dr. Sheebeare. H.* 31 *G.* 2. 1 *Burr.* 460.

2. If the court of aldermen commit *a freeman*, by warrant in writing, for refuſing to take up his *livery*, the gaoler, in making a return to a habeas corpus, muſt ſet forth the warrant at large. *The Company of Vintners* v. *Clarke. H.* 7 *W.* 3. *B. R.* 5 *Mod.* 156.

3. Whilſt the return is debating, the party may be bailed. *Rex* v. *Bethill. E.* 7 *W.* 3. *B. R.* 5 *Mod.* 23.

4. If a perſon come in on habeas corpus and give bail, yet, if it be not at the return of the proceſs, he cannot give rules, but muſt wait two terms, and then, if there be no declaration, he ſhall be diſcharged on common bail. *Hotherſhell* v. *Bowes. M.* 1 *Ann, B. R.* 6 *Mod.* 22.

5. When a perſon is brought up by habeas corpus, the return ſhall remain in court, and a copy of it only ſhall be given to the marſhal. *Anon. T.* 3 *Ann, B. R. Ibid.* 180.

6. Where the writ is returnable at a day certain, the perſon can only be brought up then, *aliter* if returnable *immediately*. *Anon. M.* 13 *W.* 3. *B. R.* 12 *Mod.* 564.

7. On good cauſe ſhewn, the court will enlarge the time to return. *Rex* v. *Clarke. M.* 3 *G.* 3. 3 *Burr.* 1362.

8. But when the commitment is for treaſon or felony, plainly expreſſed in the warrant, the officer is not obliged by the ſtat. 31 *Car.* 2. 2. to make a return as directed by that ſtatute.

9. The court will not receive the return till the return day. 2 *Bl. Rep.* 805.

10. The old rule of court, made *Michaelmas* term 1654, directing the habeas corpus to be made returnable in court at a day certain in term, unleſs directed to the ſheriffs of *London* or *Middleſex*, or unleſs it be to deliver over the defendant in diſcharge of his bail, is fallen into diſuſe, and the writ is now made returnable before the chief juſtice at his chamber immediate, and ſhould be returned in due and convenient time. Vide *Dr. Bettesworth* v. *Bell. E.* 6 *G.* 3. *B. R.* 3 *Burr.* 1875.

34 Vin. 218. (F. 2) Returns thereof. Good or not; and Exceptions to Returns of Commitments.

1. VIDE ſtat. 31 *Car.* 2. *c.* 2.

2. A conſtable is an officer within the meaning of the above ſtatute, and obliged to give copy of warrant of commitment. *Hudſon* v. *Aſh.* *E.* 5 *G.* 1. *B. R.* 1 *Stra.* 167.

3. The officer muſt ſhew, by his return, by whom the party was committed, and the cauſe of commitment. 2 *Inſt.* 55.

4. The return ought to ſhew the cauſe of commitment ſpecially and certainly. 2 *Inſt.* 55.

5. And therefore if the return be, *that he was committed for a contempt in not performing an order between* A. *and* B. *made on* 3*d* May, it is good. 4 *Com. Dig. E.* 2.

6. The return to a habeas corpus cannot be ſupplied by affidavits. *Rex* v. *Smith*, *T.* 7 *G.* 2. *B. R.* 7 *Mod.* 234.

7. Return to a habeas corpus, that he was committed to the gaoler; and returns the order, which was that *remaneat in cuſtodia* till he paid a fine of 100*l.*; though the return be not good, yet there is a good judgment returned; ſo not diſcharged. *Rex* v. *Bythell.* *T.* 7 *W.* 3. *B. R.* 12 *Mod.* 74.

8. Commitment by ſecretary of ſtate good, but the ſpecies of treaſon muſt be expreſſed, elſe ill. *Rex* v. *Row and Kendall.* *Ib.* 82.

9. Return, that he was committed to the keeper of *Newgate* by the court of aldermen, not good, becauſe it does not appear that he was an officer of the city; though the court in fact know he is ſo, yet they cannot judicially take notice of it. *Rex* v. *Clarke.* *Ib.* 113, 114.

10. To habeas corpus to an inferior court, connuſance of pleas is no good return. *Taylor* v. *Rignold.* *H.* 13 *W.* 3. *B. R.* 12 *Mod.* 666.

11. When a man is committed for any crime, either at common law or by act of parliament, for which he is puniſhable by indictment, a return, *that he was committed by due courſe of law*, is good. But if the commitment be in purſuance of a ſpecial authority, the terms of the commitment muſt be ſpecial, and exactly purſue the authority; and therefore if it do not appear on the return to have been according to that authority the return will be bad. 2 *Bl. Rep.* 806.

12. If the return ſhew a good cauſe of commitment, it will be good, although it wants form, as if the return ſays, *that it was awarded in court* quod remaneat *in cuſtody for a fine*, without ſaying *quod committitur pro fine*. *Rex* v. *Bethill.* *E.* 7 *W.* 3. *B. R.* 5 *Mod.* 24.

13. Return, "That at the coming of the writ, defendant was not in the keeper of the priſon's cuſtody," is good. *Rex* v. *Bethuen.* *M.* 12 *G.* 2. *B. R.* *Andr.* 281.

14. "That

14. " That before the coming of the writ, defendant was discharged out of his cuſtody by an order of ſeſſions," without ſaying what ſeſſions, what order, or that he was diſcharged by due courſe of law, good, for the purpoſe of filing the writ. *Ibid.*

15. To a habeas corpus, directed to the king's meſſengers, it ſeems a good return, that at the time of the coming of the writ, or at any time ſince, he was not in their cuſtody. *Semb. Rex* v. *Wilkes. E.* 3 *G.* 3. *C. B.* 2 *Wilſ.* 154.

16. A return is bad if it do not ſhew an expreſs and certain cauſe of commitment. As if a return be, *that he was committed for aiding the eſcape of one for high treaſon*, without ſaying what ſpecies of treaſon, it is bad. *The Caſe of Kendall and others. M.* 7 *W.* 3. *B. R.* 5 *Mod.* 83.

17. The defendant was committed by two juſtices of peace, for that he, being overſeer of the poor, had not accounted as by ſtatute directed, and had not accounted before them, is bad; he might have accounted before others. *Rex* v. *Gibſon. Fort.* 272.

18. The following return to an habeas corpus, " I had not, at the time of receiving this writ, nor have I ſince had the body of *A. B. detained* in my cuſtody, ſo that I could not have her before, *&c.*" held inſufficient, becauſe it was evaſive. *Rex* v. *Winton. M.* 33 *G.* 3. 5 *T. R.* 89.

19. Yet the default of an averment of a fact in a return may be amended in court. *Per Hale. Anon. M.* 25 *Car.* 2. 1 *Mod.* 103.

20. Commitment by commiſſioners of bankrupt, till the defendant conform to their authority, ill. *Bracy's Caſe*, 1 *Salk.* 348. *Vide* Str. 880. 2 Bl. R. 806.

1141. 2 Hawkins, c. 16. ſ. 18., and notes to ſaid ſection in 6th edit., where it is ſtated that commitments grounded upon acts of parliament muſt purſue the concluſions which the ſtatutes preſcribe. And where a man is committed as a criminal, the concluſions muſt be, *until he be delivered by due courſe of law.* If he be committed for *contumacy*, it ſhould be, *until he comply.*

21. If a return be inſufficient, an *alias habeas* ſhall be granted, and the officer ſhall be amerced. *Anon.* 12 *Will.* 3. 1 *Salk.* 350.

22. If no return to the *alias*, or a bad one, an attachment will be granted. *Ib.*

(H) Effect. Or what removed,

14 Vin. 216.

1. A Defendant may cauſe himſelf to be removed from any civil cuſtody into that of the marſhal.

2. A priſoner, removed into the cuſtody of the marſhal by habeas corpus, cannot be removed elſewhere till he has anſwered to the cauſe here. *Anon. M.* 11 *W.* 3. *B. R.* 1 *Salk.* 350.

3. *Habeas corpus ad teſtificandum* lies to remove a priſoner in execution, yet where it appears to be a contrivance, the court will not grant it. *Rex* v. *Burbage. T.* 3 *G.* 3. 3 *Burr.* 1440.

14 Vin. 227.

(I) Obeyed. How it muſt be obeyed.

1. A Writ of habeas corpus, if not ſigned by a judge, need not be obeyed. *Rex* v. *Roddam.* *M.* 18 *G.* 3. *B. R.* 2 *Croſs,* 672.

2. A writ of *habeas corpus ad teſtificandum*, to bring up a ſailor on board a ſhip, who is not detained there as a priſoner, ought not to be granted without an affidavit that he has been ſerved with a ſubpœna, and is willing to attend. *Ibid.*

3. The court will not direct a perſon to be turned over on habeas corpus till the gaoler's fees be paid. 2 *Hawk. P. C.* 151. *ſ.* 31. *And* vide 1 *Burr.* 443.

Opinion of Fortescue, J. Crompton v. Ward, 1 Str. 433. *videtur contra*; ſed vide.

4. Officer muſt obey the writ, though fees unpaid. *Hopman* v. *Barber.* *M.* 2 *G.* 2. *B. R.* 2 *Stra.* 814.

5. The court will require a return to be made to the firſt writ of habeas corpus, without iſſuing an *alias* or a *pluries*, and if the firſt writ be not obeyed an attachment will immediately iſſue. *Rex* v. *Winton.* *M.* 33 *G.* 3. 5 *T. R.* 89.

6. If habeas corpus is not returned, attachment *niſi* ſhall go without rule to return. *Rex* v. *Wright.* *M.* 5 *G.* 2. *Stra.* 915.

7. If habeas corpus is not obeyed, the court will grant attachment even againſt a peer: for he has no privilege againſt the proceſs of *Weſtminſter-hall* to compel obedience to habeas corpus. *Rex* v. *E. Ferrers.* *T.* 31 *G.* 2. 1 *Burr.* 631.

8. And the return ought to be made within three months. 1 *Sid.* 78.

[F]

Hearing.

14 Vin. 233.

(A) Of ſetting down a Cauſe for Hearing.

THE courſe of the court is, upon default of plaintiff or defendant appearing to hear judgment when the cauſe is called, and an affidavit of ſervice to hear judgment is wanting, to ſtrike the cauſe out of the paper, without coſts to either party. *Hind. Cn. Practice*, 407.

(B) Manner of *proceeding* to, and at what Time the Hearing may be.

14 Vin. 234.

Vide *Practical Regiſter.*

(C) What may be read.

14 Vin. 235.

1. THOUGH a bill in chancery cannot be read at law, yet it may be read in chancery. 1 *Atk.* 65. *June* 1737. *Metcalfe* v. *Ivet.*

2. Parol evidence, though improper when offered againſt the legal operation of a will, or an implied truſt, admitted, where it was to ſupport the law and the equity too. 1 *Atk.* 386. *July* 1737, *Taylor* v. *Taylor.*

3. Parol evidence of a father's declarations not allowed to debar a child of her orphanage ſhare; but proofs of declarations by the huſband, as to an advancement in marriage with the daughter of a freeman, admitted; evidence alſo of the declarations of the wife, made during the coverture of her firſt huſband, admitted to be read againſt the ſecond. 1 *Atk.* 407. *March* 1741. *Trowbiner* v. *Watts.*

4. Where an original note of hand is loſt, and a copy of it offered in evidence, you muſt ſhew that the original note was genuine, before the copy can be read. 1 *Atk.* 446. *Mich.* 1737. *Goodier* v. *Lake.*

5. Bill to ſet aſide an aſſignment of leaſehold eſtate, and ſuggeſting that it was not intended to be an abſolute aſſignment, but ſubject to a truſt for the plaintiff's benefit; though no expreſs truſt in the deed, yet as it might be collected from circumſtances ariſing out of the aſſignment itſelf, inconſiſtent with an abſolute aſſignment, parol evidence was admitted to explain the tranſaction. 1 *Atk.* 447. *March* 1737. *Hutchins* v. *Lee.*

6. There cannot be parol evidence of a truſt ſince the ſtat. 29 *C.* 2., yet it is admitted to avoid a fraud. *Ibid.*

7. Parol evidence not admitted to add a legacy to a will. 1 *Atk.* 448. *July* 1739. *Whitton* v. *Ruſſel.*

8. Though a wife be a defendant, and charged with fraud and malpractice, yet the evidence of the huſband ſhall be admitted where the intereſt of a third perſon is concerned. 1 *Atk.* 451. *Trin.* 1738. *Cotton* v. *Lutterell.*

9. Where two leaſes are ſet up, one of them cannot be read till poſſeſſion has been proved under it, for the rules of evidence are the ſame in equity as at law. 1 *Atk.* 453. *Mich.* 1737. *Manning* v. *Lechmere.* *And* 2 *Atk.* 48. *Henley* v. *Phillips*, S. P. *and* 228, S. P.

10. Parol

10. Parol evidence not admitted to prove teſtator's intention to diſpoſe of a ſum of money under a power. 1 *Atk.* 558. 1739. *Melton* v. *Hutchinſon.*

11. The bare entry of a ſteward in his lord's contract book with his tenants is not evidence of *itſelf*, that there is an agreement for a leaſe between the landlord and tenant. 1 *Atk.* 497. *March* 1788. *Charlewood* v. *Duke of Bedford.*

12. A copy of admittance may be read, though not ſigned, where it is of 30 years ſtanding. 2 *Atk.* 45. *July* 1740. *Dean and Chapter of Ely* v. *Sir S. Stewart.*

13. Where a witneſs, who atteſted a deed, is dead, he muſt be proved to be ſo. 2 *Atk.* 48. *July* 1740. *Henley* v. *Phillips.*

14. Where a witneſs has lived abroad, a ſtrict proof of his death is neceſſary, otherwiſe where he has lived conſtantly in *England.* *Ibid.*

15. A criminal conviction againſt the huſband cannot in a civil ſuit be read againſt the wife. 2 *Atk.* 64. *October* 1740. *Hanbury* v. *Lord Bateman.*

16. A conviction of recuſancy cannot be read againſt a third perſon under the 11th & 12th *W.* & *M.*, but the facts muſt be proved. *Ibid.*

17. Parol evidence admitted to ſhew a truſt from the mean circumſtances of the pretended owner of the real eſtate. 2 *Atk.* 71. *November* 1740. *Willis* v. *Willis.*

18. A counterpart may be read, if an original deed is loſt, and if no counterpart, a copy, and if no copy, parol evidence of the manner of its being loſt; if deſtroyed by fire, or loſt by any unforeſeen accident, they are ſufficient excuſes. 2 *Atk.* 71. *November* 1740. *Villiers* v. *Villiers.* 2 *Atk.* 541. *April* 1743. *Harvey* v. *Phillips*, S. P.

19. Where there was a written agreement, the defendant was allowed to read parol evidence to rebut an equity ſet up by the bill. 2 *Atk.* 99. *December* 1740. *Walker* v. *Walker.*

20. Evidence of an exemption from tithes depends on uſage, and a *poſterior* uſage is evidence of an anterior, for no other can be had. 2 *Atk.* 136. *February* 1740. *Archbiſhop of York* v. *Sir Miles Stapleton.*

21. A bill for quit-rents, and an account produced, it muſt be proved to have been a ſteward's or bailiff's, or it is not to be admitted. 2 *Atk.* 140. *February* 1740. *Franks* v. *Carry.*

22. Though a witneſs be an infant, his tender years will not invalidate his teſtimony. 2 *Atk.* 245. *February* 1741. *Smith* v. *French.*

23. Not only contrary to the ſtatute of frauds, but to the common law before the ſtatute, to add any thing to an agreement in writing by parol evidence. 2 *Atk.* 383. *Auguſt* 1742. *Partericbe* v. *Powlet.*

24. In the caſe of ſatisfaction of legacies, parol declarations have been admitted. 2 *Atk.* 518. *February* 1742. *Studal* v. *Jekyll.*

25. Defen-

25. Defendant having examined his clerk in court, the plaintiff exhibited interrogatories for croſs-examining him, to which he demurred, for that he knew nothing of the matters inquired of, except what came to his knowledge as the defendant's clerk, or *agent*. Demurrer over-ruled, for *agents* are not privileged as counſel, ſolicitors and attorneys are. 2 *Atk.* 524. *March* 1742. *Vailliant* v. *Dodemead.*

26. Parol evidence not admitted to explain an agreement, 2 *Atk.* 558. *May* 1743. *Tyrrel* v. *Hope.*

27. A merchant's copy-book of letters has been allowed to be read, where a perſon, who had the original letters, refuſed to produce them. 2 *Atk.* 611. *July* 1743. *Sturt* v. *Melliſh.*

28. Where a plaintiff examines only to a collateral fact one witneſs, yet the court will ſo far lay ſtreſs upon this evidence, as it may ſeem to explain any collateral circumſtances. 3 *Atk.* 270. *Jan.* 1744. *Anon.*

29. Bill for a ſpecific performance of an agreement for a leaſe, which was ſigned by defendant, the leſſor only, who inſiſted that it ought to be inſerted in the agreement, that the tenant ſhould pay the rent clear of all taxes; the plaintiff, who wrote the agreement, having omitted to make it ſo. Evidence was admitted to ſhew, that this was a part of the agreement. 3 *Atk.* 388. *October* 1746. *Joynes* v. *Statham.*

30. A mortgagee, in an agreement for a mortgage omits to inſert a covenant for redemption. Evidence admitted to ſhew the omiſſion. *Ibid.*

31. A mortgage drawn in two deeds, one an abſolute conveyance, the other a defeaſance, which mortgagee omits to execute, Evidence admitted to ſhew the miſtake. *Ibid.*

32. A certificate of the original agreement, between the rector and vicar in relation to tithes, muſt appear to come out of the charter-houſe of the abbot, and not out of his hands only, or it cannot be read. 3 *Atk.* 500. *May* 1747. *Eaſte* v. *Ball.*

33. A certificate from a foreign abbey was not allowed before the reformation. *Ibid.*

34. In a matter which depends purely upon tradition, the evidence of an ancient perſon is admitted. 3 *Atk.* 578 *Mich.* 1747. *Attorney General* v. *Parker.*

35. The bare atteſting of a deed as a witneſs will not create a preſumption of knowledge of the contents, ſo as to affect with fraud, but if there be knowledge of the contents, ſigning as a witneſs is a ſufficient ſigning, within the ſtatute of frauds, to bind, though not a party thereto. 1 *Veſ.* 6. *May* 1747. *Welford* v. *Berzely.*

36. Payment of intereſt, for a legacy by an executor from time to time, ſhall be evidence of aſſets; not ſo of a ſingle inſtance of payment of intereſt. 1 *Veſ.* 75. *March* 1747. *Corporation of Clergymen's Sons* v. *Swainſon.*

37. Where the defendant's anſwer is a clear denial of a fact, which is proved only by one witneſs, the court will not decree

againſt

againſt the anſwer; but otherwiſe, where the denial of a fact is not poſitive. 1 *Veſ.* 66. *December* 1747. *L. Neve* v. *L. Neve.* Vide *alſo* 1 *Veſ.* 97 *and* 125.

38. Where the queſtion was, Whether the advancing or paying a ſum of money by a father was intended as a bounty to a child, his papers, books, and memoranda were evidence. 1 *Veſ.* 77. *March* 1747. *Hill* v. *Ballard.*

39. Where any conſideration is mentioned in a deed, and it is not ſaid for other conſiderations, proof of other conſiderations is inadmiſſible, but otherwiſe where there is no conſideration mentioned at all in the deed. 1 *Veſ.* 128. *October* 1748. *Peacock* v. *Monk.*

40. Where deeds or writings are deſtroyed by a party who would take the benefit of them, equity will go farther than a court of law *in odium ſpoliatoris*; but upon a caſual deſtruction of deeds, the evidence is the ſame in equity as at law. 1 *Veſ.* 235. *May* 1749. *Cockes* v. *Hellier.*

41. Where *A.* tenant in tail, remainder to *B.* in tail, joined in a mortgage and bond to raiſe money, and *A.* died, it ſeems that parol evidence could not be admitted of an agreement, that his creditors ſhould come upon *B.*'s remainder in eaſe of *A.*'s perſonal eſtate. 1 *Veſ.* 251. *June* 1749. *Robinſon* v. *Gee.*

42. Parol evidence of intent, that a ſettlement of 100*l.* ſhould be in ſatisfaction of a will bequeathing that ſum, admitted. 1 *Veſ.* 323. *November* 1749. *Maſcal* v. *Maſcal.*

43. The anſwer of a defendant in another cauſe, in which he admitted a ſettlement, was offered to be read; objection that it could only be read as collateral evidence, and not as a judicial confeſſion, and that to let in any kind of collateral evidence, there ſhould be ſome proof of the deed having been loſt; the anſwer was read, ſubject to proof being made of the loſs of the deed. 1 *Veſ.* 388. *February* 1749. *Whitfield* v. *Fauſſet.*

44. A deed loſt may be proved by circumſtances, firſt ſhewing that it once exiſted, and next, that it is loſt, and cannot be come at. *Ibid.*

45. All contracts depend on the uſage of trade, which is proved by the evidence of perſons converſant therein. 1 *Veſ.* 459. *May* 1750. *Baker* v. *Paine.*

46. Whether the evidence of a witneſs to a will, who was a creditor of the teſtator's, could be admitted. *Dub.* 1 *Veſ.* 503. *July* 13, 1750. *Price* v. *Lloyd, and* 2 *Veſ.* 374. *Stat.* 25 *G.* 2. *c.* 6.

47. All deeds and other inſtruments muſt be proved, unleſs in the hands of the adverſe party, or deſtroyed, then parol evidence of their contents allowed. 1 *Veſ.* 505. *July* 1750. *Cole* v. *Gibſon.*

48. A man's own entry in a book of account allowed as evidence, on enquiry before the Maſter, where all papers, *&c.* are to be produced, not as evidence of the demand, but as a claim in his life-time. 2 *Veſ.* 54. *November* 1750. *Leſebure* v. *Weiden.*

49. Parol

49. Parol evidence of a father's intent as to education, on deviſe of a guardianſhip, admitted. 2 *Veſ.* 56. *Nov.* 1750. *Anon.*

50. Decree, where the preſent plaintiffs and defendants were parties, read as evidence, though not concluſive. 2 *Veſ.* 89. *December* 1750. *Aſkew* v. *Poulterers' Company.*

51. So, as to depoſitions in the above cauſe where the bill and the decree was for the performance of truſts, ſettling the rights of all. *Ibid.*

52. Wife, having a ſeparate eſtate, borrows money: her declarations, as the debtor, read. 2 *Veſ.* 193. *Feb.* 1750. *Peacock* v. *Monk.*

53. Sentence in the eccleſiaſtical court for fornication, &c., in a criminal way, not evidence againſt the iſſue. 2 *Veſ.* 245. *March* 1756. *Brownſwood* v. *Edwards.*

54. Parol evidence on one ſide may be called for by the other. 2 *Veſ.* 331. *July* 1751. *Blunt* v. *Cumyns.*

55. Evidence of counſel or attorney *ſubmitting* to be examined, read. 2 *Veſ.* 446. *July* 1752. *The Biſhop of Wincheſter* v. *Fournier.*

56. Exhibits *viva voce* cannot be read where there is a right to croſs-examine. 2 *Veſ.* 479. *July* 1752. *Earl Pomfret* v. *Windſor.*

57. Where a cauſe ſtands over to make or add new parties, and, on amendment, publication is open, *it ſeems* that all parties may enter into a new examination; and that a new examination to the original bill may be read againſt another defendant. 2 *Veſ.* 524. *July* 1754. *Archer* v. *Pope.*

58. Public books, as of a manor, ordered to be produced; but not books in private hands. 2 *Veſ.* 578. *Auguſt* 1754. *Anon.* and 624.

59. Depoſitions in a croſs cauſe read on the account, though the bill was diſmiſſed. 2 *Veſ.* 579. *Auguſt* 1754. *Lubiere* v. *Genon.*

60. Exhibits found forged cannot afterwards be ſaid to be immaterial, nor will the court go into other evidence, the verdict being deciſive. 2 *Veſ.* 579.

61. The rule, that a witneſs to be examined *de bene eſſe* muſt be ſeventy years old, diſpenſed with on affidavit, that he was upwards of ſixty, and greatly afflicted with the gravel, and that all the parties lived in *Virginia*. *Amb.* 65. *June* 1747. *Fitzhugh* v. *Lee.*

62. On a rehearing depoſitions may be read, which were not read at the original hearing. *Amb.* 90. *May* 1750. *Cunyngham* v. *Cunyngham.*

63. Where a reſulting truſt is inſiſted on, in oppoſition to the legal operation of a will, parol evidence admitted to rebut that equity. *Amb.* 123. *Lake* v. *Lake* *Nov.* 1751.

64. On a bill to have conſtruction of a ſettlement, articles or inſtructions cannot be given in evidence, unleſs the bill points them out, or the ſettlement refers to them. *Amb.* 147. *June* 1752. *Pritchard* v. *Quinckant.* 2 *Veſ. jun.* 417. S. P.

65. In

65. In matters of trade, evidence of the uſage and cuſtom of merchants is admiſſible. *Amb.* 186. *Aug.* 1753. *Ekins* v. *Macliſh.* 2 *Veſ.* 331.

66. Parol evidence admitted to prove the deſtruction and contents of deeds. *Amb.* 247. *Dec.* 1754. *Saltern* v. *Melhuiſh.*

67. Legacy to poor diſſenting miniſters in any county, not void for uncertainty, but evidence admitted to prove who were intended. *Amb.* 524. *Nov.* 1765. *Waller* v. *Child.* *Amb.* 175. 374. 3 *Veſ. jun.* 148. S. P.

68. Sentence in the eccleſiaſtical court *ex directo*, held concluſive evidence upon the ſame matter coming on collaterally before the court of Chancery. *Amb.* 756. 1775. *Meadows* v. *Dutcheſs of Kingſton.*

69. The evidence of one witneſs, *corroborated by circumſtances*, though to facts denied by the defendant's anſwer, ſufficient to found a decree. 1 *Bro. Ch. Rep.* 52. *Eaſt.* 1779. *Pember* v. *Mathers.*

70. Bill to redeem an annuity, ſuggeſting that it was part of the agreement that it ſhould be redeemable, but the agreement left out of the deed, on the idea that if inſerted the tranſaction would be uſurious, parol evidence rejected, the agreement not being charged to be omitted by fraud. 1 *Bro. Ch. Rep.* 92. *Hil.* 1781. *Lord Irnham* v. *Child.* 2 *Bro. Ch. Rep.* 219. S. P. and 3 *Bro. Ch. Rep.* 168. S. P., and 1 *Veſ. jun.* 241.

71. Parol evidence of an attorney admitted to prove, that a party to a ſettlement had notice of a prior incumbrance. 1 *Bro. Ch. Rep.* 340.

72. An original letter, ſtamped after production, is evidence. 2 *Bro. Ch. Rep. Hil.* 1786. *Ford* v. *Compton.*

73. If the terms of a contract are reduced into writing, the paper muſt be ſtamped in order to make it evidence. 2 *Bro. Ch. Rep.* 309. *Feb.* 1788. *Hearne* v. *James.*

74. Where a *feme covert* diſpoſes by will, it is neceſſary to produce the probate of ſuch will to juſtify the payment of the money. 2 *Bro. Ch. Rep.* 391. *Cothay* v. *Sydenham.*

75. *Query*, Whether the rule has ever been laid down ſo largely, that a will could not be proved without examining all the witneſſes, although the practice has been to examine all? 2 *Bro. Ch. Rep.* 504.

76. Parol evidence of a parent's intention, that a portion ſhould not be a performance of a legacy. 2 *Bro. Ch. Rep.* 164—519. *Debeze* v. *Mann.*

77. Parol evidence admitted to ſhew that legacies given by a ſecond codicil were intended as accumulative. 2 *Bro. Ch. Rep.* 521. *Hil.* 1789. *Coote* v. *Boyd.*

78. A compoſition cannot be eſtabliſhed without ſhewing the deed by which it was created, or proving its exiſtence. 3 *Bro. Ch. Rep.* 217. *Feb.* 1791. *Heathcote* v. *Mainwaring.*

79. Though when a wife's eſtate is morgaged for the benefit of the huſband, ſhe has a right to ſtand as creditor on the huſband's aſſets, yet this may be repelled by evidence to ſhew her intention

intention to the contrary. 3 *Bro. Ch. Rep.* 201. *Hil.* 1791. *Clinton* v. *Hooper.* 1 *Veſ. jun.* 173. S. C.

80. An order was made on the regiſtrar of an eccleſiaſtical court, to deliver an original will to be produced in Chancery, on giving ſecurity to return it. 3 *Bro. Ch. Rep.* 263. *June* 1791. *Lake* v. *Cauſfield*, and 4 *Bro.* 476. *Dec.* 1793. *Forder* v. *Wade.*

81. A legatee, having been abroad 26 years, and not having been heard of for 25 years laſt paſt, preſumed to be dead. 3 *Bro. Ch. Rep.* 510. *Eaſt.* 1792. *Dixon* v. *Dixon.*

82. Parol evidence not admiſſible to raiſe an equity, that a penſion granted by the crown to the defendant was in truſt for the plaintiff, againſt the oath of the defendant in his anſwer. 3 *Bro. Ch. Rep.* 577. *Lady Margaret Fordyce* v. *Willes.*

83. An *abſolute* conveyance decreed to be only a ſecurity on parol evidence; it being clear, on the written evidence and the accounts of the parties, that the agreement was not what the deed purported to be. 4 *Bro. Ch. Rep.* 472. *Dec.* 1793. *Cripps* v. *Gee.*

84. Parol evidence not admiſſible to prove, from converſations before and at the time of ſigning an agreement for a leaſe, that the intent of the parties was different from the memorandum, though the ſame was written by the leſſee, and the words "*clear of all taxes*," the purport of the converſation, were omitted in the memorandum. 4 *Bro. Ch. Rep.* 514. *Feb.* 1794. 5 *Veſ. jun.* 688. S. P. *Jackſon* v. *Cator.*

85. Old age is not a ſufficient ground to preſume impoſition. 1 *Veſ. jun.* 19. *Feb.* 1789. *Lewis* v. *Pead.*

86. A father coming to baſtardize his own iſſue is, though a legal, a very ſuſpicious witneſs. 1 *Veſ. jun.* 134. 1790. *Standers* v. *Edwards.*

87. Evidence admitted to explain a latent ambiguity in a will, as in caſe of manors of the ſame name, and where there is an inadequate deſcription of a child, or a legatee; but not to explain a patent ambiguity. 1 *Veſ. jun.* 259. 1790. *Baugh* v. *Mead.* 3 *Veſ. jun.* 148. *Abbot* v. *Moſſe*, S. P.

88. Agreement for a leaſe of a farm, referring to a paper containing the terms, parol evidence to prove which of the clauſes in that paper had been read at a meeting between the parties, refuſed. 1 *Veſ. jun.* 326. *May* 1791. *Brodie* v. *Paul.*

89. *A.* ſtated by books in evidence for the defendant to be a merchant abroad, and one witneſs ſwearing he knew him late a merchant abroad, and no evidence of his return, is ſufficiently proved out of the juriſdiction, and defendant precluded from objecting that he was not a party. 1 *Veſ. jun.* 416. *Feb.* 1792. *Weymouth* v. *Boyer.*

90. Where an eſtate is charged with debts and legacies, a creditor by bond is not admiſſible evidence that the legacies are not paid. 2 *Veſ. jun.* 11. *Mich.* 1792. *Jones* v. *Tuberville*, and 4 *Bro. Ch. Ca.* 11. S. C.

91. An attorney may be called to diſcloſe what paſſed at the execution of a deed, as a witneſs, or as to being ſent by his client to put a judgment in execution; that is an act: but he is not to diſcloſe private converſation, as to the reaſons for executing the deed; and the depoſitions were referred to the Maſter to ſee what part came to the knowledge of the witneſs, as confidential attorney, that it might be ſuppreſſed. 2 *Veſ. jun.* 189. *June* 1793. *Sandford* v. *Remington.*

92. Evidence to prove the intention of parties to a ſettlement refuſed. 2 *Veſ. jun.* 417. *Brydges* v. *Dutcheſs of Chandos.*

93. Legacy to an executor for his care: that is equivalent to a declaration of truſt; therefore evidence is not admiſſible as to the reſidue. 2 *Veſ. jun.* 473. *Aug.* 1794. *Clennell* v. *Lewthwaite*; *Thornton* v. *Tracy.* 4 *Veſ. jun.* 22. *White* v. *Evans*, S. P.

94. No parol evidence of an intention afterwards to give an executor the reſidue will be ſufficient; it can only be to ſhew what was intended at the time he was made executor. *Ibid.*

95. Evidence of converſations with the perſon who drew the will, to ſhew the teſtatrix had no other real eſtate, rejected. 2 *Veſ. jun.* 589. *June* 1795. *Standert* v. *Standert.*

96. Parol evidence to explain an agreement refuſed. 3 *Veſ. jun.* 34. *Feb.* 1796. *Pym* v. *Blackburn.*

97. Proviſion by will increaſed upon *evidence* of the teſtator's requeſt to the executor and reſiduary legatee, and his promiſe, upon which the teſtator refuſed to make a new will. 3 *Veſ. jun.* 152. *June* 1796. *Barrow* v. *Greenough.*

98. Teſtator gave a ſum, part of his 4*l. per cent.* Bank Annuities, to his wife for life, and after her deceaſe to ſeveral relations. Evidence was admitted, that he had no ſuch ſtock at the date of the will, having previouſly ſold it all, and inveſted the produce in Long Annuities, and to ſhew the cauſe of the miſtake. 3 *Veſ. jun.* 306. *Feb.* 1797. *Selwood* v. *Mildmay.*

99. Accounts in the teſtator's hand-writing were admitted as evidence of the circumſtances, under which he made his will; but not to explain it. 2 *Veſ. jun.* 516. *Aug.* 1797.

100. Parol evidence of an intention *not* to revoke a will, rejected. 3 *Veſ. jun.* 656. *March* 1798. *Cave* v. *Holford.*

101. The ſtatute of frauds requires, not that a truſt ſhall be *created* by writing, but that it ſhall be proved by writing; which may be ſubſequent to the commencement of it. 3 *Veſ. jun.* 696. *March* 1798. *Foſter* v. *Hale*, and 5 *Veſ. jun.* 308. S. C.

102. When letters are to raiſe a truſt, there muſt be demonſtration that they relate to the ſubject. *Ibid.* 708.

103. A reference under the ſtat. 7 *G.* 2. *c.* 20. muſt proceed upon admiſſion of the principal and intereſt due upon the mortgage; and the Maſter cannot admit evidence. 4 *Veſ. jun.* 105. *July* 1798. *Hewſon* v. *Hewſon.*

104. Surrender by a mortgagee of copyholds to the uſe of his will, is no proof that he conſidered it irredeemable. 4 *Veſ. jun.* 180. *March* 1799. *Hardy* v. *Reeves.*

105. There

105. There were two inconſiſtent wills; and a codicil referring to the *firſt* by date, as the laſt will; the intermediate will is cancelled, and evidence of miſtake cannot be admitted. 4 *Veſ. jun.* 616. *May* 1799. *Croſbie* v. *Macdoual.*

106. Evidence of intention, and miſtake as to the fund rejected. 4 *Veſ. jun.* 675. *June* 1799. *Chambers* v. *Minchin.*

107. Where parol evidence between the executor and next of kin, as to the undiſpoſed of reſidue, is admitted. 4 *Veſ. jun.* 730. *July* 1799. *Dicks* v. *Lambert.*

108. Upon a legacy to the wife of the teſtator, by the deſcription of his *chaſte* wife; evidence of her incontinence not admiſſible. 4 *Veſ. jun.* 809.

109. A ſubſequent marriage and the birth of a child revoke a will. *Query* as to the propriety of admitting evidence againſt the preſumption. 4 *Veſ. jun.* 848. *July* 1799.

110. Parol evidence of an intention to ſatisfy a legacy cannot be admitted originally, as it may where it is introduced to repel a preſumption. 5 *Veſ. jun.* 79. *Nov.* 1799. *Freemantle* v. *Bankes.*

111. Whether a partnerſhip ſubſiſted in the trade of a colliery, is a fact to be tried by evidence, and evidence from books and letters was admitted. 5 *Veſ. jun.* 308. *March* 1800. *Foſter* v. *Hale.*

112. Parol evidence of a declaration in converſation that a legatee ſhould have his legacy diſcharged of debts due from him to the teſtator, was produced; but the court ſeemed to rely on the evidence in writing. 5 *Veſ. jun.* 341. *March* 1800. *Eden* v. *Smyth.*

113. Whether parol evidence of the intention of the teſtator can be read originally in oppoſition to a claim of double legacies, *Quære.* 5 *Veſ. jun.* 369. *Oſborne* v. *Duke of Leeds.*

114. The evidence of a ſubſcribing witneſs to a will, diſpoſing of real eſtate, diſpenſed with, he being abroad. 5 *Veſ. jun.* 404. *May* 1800. *Lord Carrington* v. *Payne.*

115. A partnerſhip cannot be eſtabliſhed by the evidence of partners, and their private communications. The fact muſt be proved *aliunde*. For want of ſuch proof a commiſſion againſt the oſtenſible partners was ſuſtained. 5 *Veſ. jun.* 424. *June* 1800. *Ex parte Benfield.*

116. Declarations of a party to a deed previous to the execution, admitted in ſupport of the deed againſt imputation of fraud. Declarations ſubſequent impeaching the deed were rejected. 5 *Veſ. jun.* 700. *Dec.* 1800. *Conolly* v. *Lord Howe.*

117. Evidence that an appointment was improperly obtained, being executed by a will regularly proved, was rejected. 5 *Veſ. jun.* 849. *March* 1801. *Kemp* v. *Kemp.*

Vide *Depoſitions*—*Deviſe* (G. a. 2)—*Evidence*—*Interrogatories*—*Contract*, and other proper titles.

14 Vin. 236.

(D) What may be read, by whom.

1. THE court will allow the proving of exhibits *viva voce* at the hearing, but not to let in other examinations, and this only on the application of the party, who is to make uſe of them, but no inſtance where it is allowed on the application of the contrary party. 1 *Atk.* 444. *May* 1737. *Graves* v. *Budget.*

2. Where a perſon has been examined in Chancery, in a cauſe at law between the ſame parties, his depoſition may be uſed in evidence. 1 *Atk.* 445. *Eaſt.* 1737. *Fry* v. *Wood.*

3. The anſwer of a defendant, who had been alſo defendant in another cauſe, wherein he admitted a deed to have been executed, but as to the uſes, he referred to ſuch proof as the plaintiff might be able to make; it was objected, that being an anſwer in another cauſe not then at hearing, it could be read only as collateral evidence, not as a judicial confeſſion; and that, to let in any kind of collateral evidence, there ſhould be ſome proof of the deed; the Chancellor doubted, yet ordered it to be read, yet ſubject to be concluſive or not. 1 *Veſ.* 388. *Feb.* 1750. *Whitfield* v. *Fauſſet.*

4. At law a plaintiff cannot examine a defendant as a plaintiff in equity may if there is no material evidence againſt that defendant, and he is not intereſted. 2 *Veſ.* 222. *March* 1750. *Dixon* v. *Parker.*

5. Depoſitions of a co-defendant read, where there was no material evidence againſt him, and no decree. 2 *Veſ.* 224. *Dixon* v. *Parker.* *March* 1750.

6. A co-defendant may read evidence proved by the plaintiff. 2 *Veſ.* 623. *July* 1775. *Walker* v. *Preſwick.*

7. Truſtee plaintiff in a bill to have directions of the court may be examined for one of the defendants. *Amb.* 393. *Feb.* 1761. *Armiter* v. *Swanton.*

8. On a re-hearing the *appellant* may be let into new evidence, which was not read at the original hearing, provided he will give up his depoſit. 2 *Atk.* 408. *Oct.* 1742. *Hedges* v. *Cardonnel.*

9. Decree where the preſent plaintiffs and defendants were parties read, though not concluſive evidence. 2 *Veſ.* 90. *Dec.* 1753. *Aſkew* v. *Poulterers' Company.*

10. Where a cauſe ſtands over to add parties, and on amendment publication is open, all the parties may enter into a new examination, and the new examination read againſt another defendant. 2 *Veſ.* 924. *July* 1754. *Archer* v. *Pope.*

(E) What may be read. Deponents intereſted. 14 Vin. 237.

1. A WITNESS, if intereſted, muſt produce a releaſe before he can give evidence. 2 *Atk.* 15. *Mich.* 1737. *Anon.*

2. Where a witneſs is under the neceſſity of exculpating her own character firſt, no regard ought to be paid to her evidence, as to the conduct of others. 2 *Atk.* 97. *Dec.* 1740. *Watkyns* v. *Watkyns.*

3. In caſe of fraud, the evidence of the perſon who joined in granting away her eſtate was admitted, though it invalidated her right to it. 2 *Atk.* 228. *Dec.* 1741. *Man* v. *Ward.*

4. A perſon made a defendant for form ſake, may, in equity, be examined, ſaving juſt exceptions; ſo a truſtee may be examined. *Ibid.*

5. The father of *H.*, the plaintiff in the original cauſe, examined *H.* to the merits: after his father's death he brought a bill of revivor, and became a party intereſted: this does not diſqualify him from being a witneſs. 2 *Atk.* 615. *July* 1743. *Hand* v. *Hand.*

6. On a bill brought againſt an executor to account for aſſets, the evidence of a co-executor, which tended to increaſe the teſtator's eſtate, was not allowed, as it was ſwearing for his own benefit. 3 *Atk.* 95. *July* 1744. *Mabank* v. *Metcalfe.*

7. Depoſitions of a defendant may be read for the plaintiff; but if a defendant may, by poſſibility only, be liable to coſts, this is a reaſon for refuſing his evidence. 3 *Atk.* 401. *Dec.* 1746. *Barret* v. *Umfreville.*

8. If a perſon will ſo act as to make himſelf a proper party to a cauſe, and liable *primâ facie* to coſts, though he was the only perſon preſent at the agreement, he cannot be admitted. *Ibid.*

9. The aſſignees under a commiſſion of bankruptcy brought a bill to ſet aſide an aſſignment of an annuity from the bankrupt to *M.*, as being made for no conſideration, and as evidence of the fraud offered to read the examination of *M.*'s attorney, taken before the commiſſioners, the court would not admit it, unleſs he had been examined in chief in the cauſe. But as *M.*, by his anſwer, ſet up a different right to the annuity from what he had done in his examination before the commiſſioners, the latter was read to ſhew the uncertainty. 3 *Atk.* 415. *Hamond* v. *Myers*, *Feb.* 1746.

10. A truſtee is conſidered in this court as having no intereſt at all, and is examined by order every day; but an executor or adminiſtrator in truſt have been determined not to be capable of being examined; the ground of this diſtinction is, that an executor is anſwerable for *devaſtavits*, &c. which may give an improper *bias* to his mind, and the poſſibility of mal-adminiſtration

has induced this court to reject him as a witneſs. 3 *Atk.* 604. *Fotherby* v. *Pate.* *Feb.* 1747.

11. The bill charged that the adminiſtrator *durante minore ætate* had not accounted and delivered over the aſſets received to the executor, who by anſwer, inſtead of inſiſting that he had accounted, ſubmitted to pay, which made him an incompetent witneſs. *Ibid.*

12. Witneſs indifferent when examined, though intereſted afterwards, his depoſitions read. 2 *Veſ.* 42. *Glyn* v. *Bank of England.* *Nov.* 1750.

13. Shop books in teſtator's hand-writing no evidence. *Ibid.*

14. Quære where a witneſs to a will was a creditor of the teſtator. 1 *Veſ.* 503. *Price* v. *Lloyd.* *July* 1750.

15. Depoſition of one defendant not read for another, as being concerned in intereſt, and as a decree might be againſt him. 2 *Veſ.* 219. *Dixon* v. *Parker.* *March* 1750.

16. On objection to competency, it is never read; if to credit only, it may be read. 2 *Veſ.* 220. *Ibid.*

17. Depoſitions of a co-defendant read, where there was no material evidence againſt him, and no decree. 2 *Veſ.* 224. *Ibid.*

18. Defendant, by examining witneſſes, has adjudged himſelf intereſted; yet the depoſitions may be read, if there be no colluſion with the plaintiff. *Ibid.*

19. A man's own entry in a book of account is allowed as evidence on inquiry before the Maſter, where all papers, *&c.* are to be produced, not as evidence of the demand, but as a claim in his lifetime. 2 *Veſ.* 54. *Nov.* 1754. *Leſebure* v. *Worden.*

20. The evidence of a co-defendant *particeps fraudis*, and intereſted, not allowed. 2 *Veſ.* 629. *July* 1755. *Bridgman* v. *Green.*

21. Where it is the evidence of an attorney or truſtee, the objection goes to his credit only. *Ibid.*

22. A father having impoſed upon a truſtee in a ſettlement to give his conſent to the execution of a power; on a bill brought to ſet it aſide, the truſtees were admitted to prove the impoſition, but the father was not, to clear himſelf. *Amb.* 272. *May* 1755. *Scroggs* v. *Scroggs.*

23. Defendant examined as a witneſs for plaintiff in a matter in which he is not intereſted; the plaintiff may have a decree againſt him as to other matters. *Amb.* 583. 1731. *Nightingale* v. *Dodd.*

24. Depoſition of a truſtee admitted to be read as to the *quantum* of truſt-money in her hands, which was given by a teſtamentary ſchedule to her daughter, under circumſtances which were held to go to her credit, but not to her competency. *Amb.* 592. *July* 1753. *Downing* v. *Townſend.*

25. *Particeps fraudis* cannot be examined to diſprove the fraud. *Ibid.*

26. Evidence of a bankrupt having had his allowance and certificate allowed, in regard to the terms on which a leaſe had been pledged by him. 1 *Bro. Ch. Ca.* 269. *Eaſt.* 1783. *Ruſſell* v. *Ruſſell.*

27. A witneſs competent who can recover nothing in the ſuit. 1 *Veſ. jun.* 61. *Craven* v. *Tickell.* 4 *Dec.* 1789.

28. Witneſs had been examined, and, upon ſuſpicion of his being intereſted, an iſſue was directed to diſcover his intereſt, and it was thought that the court might have ordered an interrogatory to be exhibited in the nature of a *voir dire.* 3 *Bro. Ch. Ca.* 228. 1791. *Stokes* v. *MacMerril.*

29. Where an eſtate is charged with debts and legacies, a creditor by bond is not admiſſible evidence that the legacies are not paid. 4 *Bro. Ch. Ca.* 115. *Mich.* 1792. *Jones* v. *Tuberville.* 2 *Veſ. jun.* 11. S. C.

30. What one defendant ſaid, on application for payment of a legacy, to which ſhe was not liable, not evidence againſt other defendants, where eſtates were charged with it. *Ibid.*

31. Witneſs to a will not intereſted, at the execution, or death of the teſtator, is competent, though intereſted at his examination. 2 *Veſ. jun.* 635. *July* 1795. *Biograve* v. *Winder.*

(G) What muſt be pleaded, or may be rejected at the Hearing. 14 Vin. 237.

A. Stated by books in evidence for the defendant to be a merchant abroad, and one witneſs ſwearing he knew him late a merchant abroad, and no evidence of his return, ſufficiently proved out of the juriſdiction, as would be preſumed at law, and defendant precluded from objecting that he was not a party. 1 *Veſ. jun.* 416. *Weymouth* v. *Boyer.* *Feb.* 1792.

Vide *Plea.*

Heir. (F)

(B. 2) Charged, in what Caſes, and how. 14 Vin. 239.

1. IF *A.*, ſeiſed in fee of lands, poſſeſſed of perſonal eſtate, gives all his worldly goods to his wife, and then deviſes the lands to her for life, then to *R.* his ſon and his heirs, and gives *M.* his daughter 150*l.*, to be paid her in twelve months after *R.* ſhall come to enjoy the premiſes, and if *R.* dies before his mother, then *H*, another ſon, coming to the poſſeſſion thereof, and ſur-

viving his mother, ſhall pay *M.* 200*l.*: this charges the real eſtate only; and ſhall be paid by the heir claiming under the deviſee and heir at law of the teſtator. 1 *Atk.* 573. *Mich.* 1738. *Miles* v. *Leigh.*

2. A man cannot by any form of conveyance raiſe a fee ſimple to his own right heirs, by the name of heirs, as a purchaſe, ſo as to prevent the reverſion from being aſſets to ſatisfy the ſon's debts. 2 *Atk.* 57. *Oct.* 1740. *Godolphin* v. *Abingdon.*

3. *George Ward*, having power to charge his eſtate with 2000*l.*, by his will gives 500*l.* a-piece to his two ſiſters, and dies indebted to the plaintiffs: this 2000*l.* is the perſonal eſtate of *George Ward*, and liable to his debts. 2 *Atk.* 172. *April* 1741. *Bainton* v. *Ward.*

4. *Thomas Delabay*, on his marriage, ſettled his eſtate on himſelf for life, on his wife for life, remainder to truſtees to preſerve contingent remainders, remainder to his firſt and every ſon in tail male, remainder to himſelf in fee. A ſon is born; the father dies indebted by bond; the ſon afterwards dies without iſſue; but by his will deviſes the eſtate to the defendant in fee: the reverſion being come into poſſeſſion, was aſſets to pay the father's debts. 2 *Atk.* 204. *Trin.* 1741. *Kinnaſton* v. *Clark.*

5. A deviſe of an eſtate charged with the payment of debts to a collateral relation, being a deviſe to a ſtranger, the deſcent is broken, and it is equitable aſſets. A mere truſt eſtate deſcending upon an heir at law, is legal aſſets. *Plunket* v. *Penſon.* *April* 1742. 2 *Atk.* 293.

6. If a man ſeiſed in fee of an eſtate, having borrowed money, gives bond for it, and afterwards a mortgage on it, and afterwards by will deviſes the eſtate in fee ſo mortgaged, and alſo an eſtate for life to *A.* his wife, and makes her ſole executrix, and after making his will, purchaſes, at two different times, the reverſion in fee of the lifehold eſtate, and dies without altering his will: the lifehold eſtate, and the reverſion of it, ſo purchaſed, ſhall deſcend to the heir at law; but it ſhall be liable as real aſſets to exonerate the mortgaged eſtate in fee deviſed to *A.* the wife. 2 *Atk.* 424. *Mich.* 1742. *Galton* v. *Hancock.* 427-434. S. C.

14 Vin. 260.

(I) *Bound.* In what Caſes.

1. IF *A.*, and *B.* his wife, ſeiſed in right of *B.* of lands in *D.*, held by leaſe for three lives, and ſeiſed of the inheritance in fee, expectant upon the death of *B.*'s grandmother and mother of a manor and lands in *L.*, mortgage the lands in *D.* for 1000*l.*, and then the manor, *&c.* in *L.* for 800*l.*, and then, on borrowing 200*l.* more, ſubject both to the payment of the three ſums; and before payment *A.* dies and *B.* becomes ſolely ſeiſed, and borrows 240*l.* 6*d.*, which, with 1159*l.* 19*s.* 6*d.* intereſt, makes up 2400*l.*; and by indorſement on the ſecond mortgage makes both ſubject thereto; and then agrees with *C.* that for 2260*l.* 10*s.* ſhe ſhall convey

to

to him and his heirs the eſtate in *L.*, ſubject to the two lives, the money to be applied in diſcharge of the mortgage, and that the leaſe ſhould be renewed, and a third life (*C.*s ſon) added, and then *C.* to lend her 1600*l.* to pay the reſidue of the mortgage, the fine, and her debts, and *C.* pays 100*l.*, and the grandmother dying, *C.* agrees to pay 146*l.* more, and pays ſeveral other ſums in part, and the leaſe is renewed and the fine paid, and *C.* takes notes and a bond for the ſums advanced till the agreement ſhall be completed, and before that *B.* dies inteſtate: On a bill by her adminiſtrator, for himſelf and the creditors of *C.*, admitting the facts, the agreement ſhall be carried into execution againſt the heir at law. 3 *Atk.* 1. *Mich.* 1743. *Lacon* v. *Mertins.*

2. *A.* conceiving himſelf entitled to a copyhold, was admitted, and ſold it; it afterwards deſcended to him; he died without perfecting the conveyance. This is a perſonal equity, and does not bind his heir. *Semb.* 1 *Anſt.* 11. *Eaſt.* 32 *G.* 3. *Morſe* v. *Faulkener.*

3. Truſt-term in a will to raiſe out of a real eſtate ſeveral ſums, of which ſome were ſecured by the teſtator's bond and covenant, the intention being to give them as portions out of the land, not as debts or legacies, the perſonal eſtate not applicable. 3 *Veſ. jun.* 475. 1797. *Read* v. *Litchfield.*

Vide (B. 2).

(K. 2) Pleadings in Actions againſt him.

14 Vin. 261.

DEBT againſt an heir; the defendant pleaded *riens per deſcent*, except a meſſuage or dwelling-houſe with the appurtenances, and alſo a certain windmill with the appurtenances; which ſaid premiſes were ſubject and liable to the payment and ſatisfaction of a certain ſum of money, laid out and expended by the defendant, ſince the death of the anceſtor, for, in, and about the repairs of the windmill, with the appurtenances, over and beyond the amount of the rents, iſſues, and profits thereof: This plea was ruled ill on general demurrer. *Shetelworth* v. *Neville. Mich.* 27 *Geo.* 3. *B. R.* 1 *Durnf. & Eaſt's Rep.* 454.

(Q. 3) Where the Heir ſhall be compelled to join in a Sale.

14 Vin. 274.

THE court will not declare a will well proved, where the heir at law is not before the court, though he cannot be found; but it will decree a ſale. 2 *Atk.* 120. *Hil.* 1740. *French* v. *Barrow.*

Vide title *Deviſe* (S. C.), and the caſes there cited.

14 Vin. 276.

(R) *Favored.* In general.

1. *A.* Seiſed in fee, deviſes his lands and tenements in *B.* to truſtees, to apply part of the rents to charitable uſes. The teſtator dies; the church of *B.* becomes void; the heir at law ſhall preſent. *Meuſey* v. *Langham. Mich.* 1735. *Ca. Temp. Talb.* 143.

2. The freehold deſcending on the heir, an executor cannot enter to take away fixtures without being a treſpaſſer. *Ex parte Quincey*, 1 *Atk.* 477. *Aug.* 1750.

3. Teſtator deviſed all his lands to *T. C.* and *J. P.*, and their heirs in truſt, that they ſhould ſell his lands in ——, and out of the purchaſe-money pay his debts; and as to the reſt, in truſt, to receive the rents and to make leaſes for 99 years, determinable, *&c.* and therewith to pay his debts and legacies, and then to the uſe of *J. A.*, wife of *C. A.*, for life; remainder to the iſſue male and female of her body; and makes the truſtees executors: he likewiſe gives a legacy of 500*l.* to his nephew *Thomas Prowſe*, to be paid at 21 or marriage, who died before 21. The perſonal eſtate, of the value of 700*l.*, and the lands in ——, were not ſufficient to pay the debts. Bill by the adminiſtrator of *Thomas Prowſe* to have the 500*l.* raiſed, which the court refuſed. *Prowſe* v. *Abingdon*, 1 *Atk.* 482. *Eaſt.* 1738.

4. Every heir at law has a right to inquire by what means and by what deed he has been diſinherited. *Harriſon* v. *Southcote*, 1 *Atk.* 539. *July* 1741.

5. An heir, before he has eſtabliſhed his title at law, may come here to remove terms out of the way, which would prevent his recovering there, and may alſo have production and inſpection of deeds and writings. *Ibid.*

6. 10,000*l.* charged by Lord *Bingley* on a term of 1000 years ſhall not be paid off out of his perſonal eſtate; but the land on which it is charged ſhall bear the burthen. *Burgoigne* v. *Fox*, 1 *Atk.* 575. *May* 1738.

7. An heir at law does not want an expreſs intention to take by a will, though it is otherwiſe with regard to a deed. *Lloyd* v. *Spillet*, 2 *Atk.* 151. *March* 1740.

8. If a man ſeiſed in fee of *A.* directs that it ſhall be exchanged for *B.*, and deviſes it to truſtees for that purpoſe, and to permit his wife to enjoy *A.* till the exchange, and then to ſettle *B.* on his wife for life, with remainders to the ſame perſons to whom he had limited other manors by his will, whereby he has deviſed all his real eſtates to truſtees, and the exchange cannot be made; the heir at law of the teſtator, and of the ſurviving truſtee for *A.*, ſhall not have *A.*; but the perſon entitled under the will to the other manors ſhall have it. 2 *Atk.* 366. *Trin.* 1742. *Earl of Coventry* v. *Coventry.*

9. In

9. In exchanges it is not clear on an alienation by one party, and an eviction, whether the heir or the alienee ſhould enter. *Ibid.* 2 *Atk.* 369. *July* 1742.

10. If a perſon incapable of managing his affairs, and who is afterwards found a lunatic, at that time lays out part of his perſonal eſtate in the purchaſe of land, with the approbation of his only ſon, the purchaſe ſhall ſtand; for the court will give the turn of the ſcale in favour of the heir at law. 2 *Atk.* 412. *Mich.* 1742. *Sergeſon* v. *Sealey.*

11. If money be ſettled to be laid out in land, and afterwards all the parties intereſted agree, that if *A.* dies before it is ſo inveſted, then it ſhall go to them, and their executors and adminiſtrators, according to their reſpective intereſts, and one of the parties dies before *A.*, it ſhall go to the heir, and not to the executor. 2 *Atk.* 452. *Mich.* 1742. *Oldham* v. *Hughes.*

12. On a bill to eſtabliſh a will againſt an heir at law, though he makes default, the proofs muſt be read; for the will cannot otherwiſe be proved. 3 *Atk.* 25. *Feb.* 1743. *Webb* v. *Litcot.*

13. But where there is a truſt of money clearly intended to be conſidered as money, though afterwards there is a power given to the truſtees to lay it out in land, yet if it is not done, it ſhall not be conſidered as land, nor go to the heir. 3 *Atk.* 212. *Hil.* 1744. *Stamper* v. *Miller.*

14. If a man, by articles before marriage, covenant to ſettle lands, or a rent-charge thereout, of 40*l.* *per ann.*, on truſtees to the uſe of himſelf for life, then to the wife for life in bar of dower, remainder to the heirs of their bodies, and he has then no real eſtate, but purchaſes afterwards one of 9*l.* in *A.* and another of 40*l.* in *B.*, ſubject to an eſtate for life to another in an undivided moiety, the lands in *A.* and the moiety in poſſeſſion of thoſe in *B.* ſhall be conſidered as purchaſed in performance of the covenant, and go towards the widow's jointure, the moiety not in poſſeſſion ſhall go to the heir at law. 3 *Atk.* 323. 1746. *Deacon* v. *Smith.*

15. If *A.*, by articles before marriage with *B.*, covenants to lay out 2000*l.* in land, and to ſettle on *A.* for life, *B.* for life, then to truſtees to ſell and divide the money among the children of the marriage, to ſons at 21, daughters at 21 or marriage, provided no ſale be made till one of the ſhares become payable; and lands are purchaſed, part before and part after *A.*'s death. *C.*, the only child, attains 21 in *B.*'s lifetime, but never applies for a ſale, nor are the lands conveyed to her, but ſhe lets leaſes of them, reſerving rent to her and her heirs; *B.* dies; *C.* dies inteſtate; the lands ſhall go to the heir at law. 3 *Atk.* 680. *Hil.* 1747. *Crabtree* v. *Bramble.*

16. If a man deviſes a legacy out of his land to his heir at law, and the land to another; and the will is not well executed according to the ſtatute of frauds for the real eſtate; the court will not compel the heir at law, upon accepting the legacy, to give up the land. 3 *Atk.* 695. 1740. *Herle* v. *Greenbank.* 1 *Veſ.* 298. S. C.

17. If

17. If a man gives legacies to his executors, and a copyhold to *A.*: he paying his executors 1000*l.* and gives the reſidue of his eſtate to a charity; this 1000*l.* is a charge on real eſtate, therefore void by the ſtatute of *Mortmain*, and the deviſee cannot take without performing the condition; therefore the 1000*l.* ſhall go to the heir. 1 *Veſ.* 108. *Trin.* 1748. *Arnold* v. *Chapman.*

18. Where a man, by will, directs his real eſtate to be ſold, and the produce, together with his perſonal, to pay debts and legacies, and one of the legacies is void by law, or lapſes, it goes to the reſiduary legatee, and not to the heir at law. 1 *Veſ.* 320. *Mich.* 1745. *Durour* v. *Motteux.*

19. Where an heir at law, by his anſwer to a bill brought to eſtabliſh a will, admits it to be duly executed, and to the purport as ſet forth in the bill, his ſaying at the cloſe of his anſwer that he is heir at law to the teſtator is not enough to entitle him to an inſpection of the deeds, even if he had pointed out what the deeds were he wanted to inſpect, and the ſubſtance of them, which was not the caſe. *Potter* v. *Potter*, 3 *Atk.* 719. 1 *Veſ.* 274. S. C. *July* 1749.

20. A copyhold tenement intailed being burnt, a collection in briefs to rebuild was paid to the guardian of the tenant in tail, who dies under age, without its being ſo applied; the claimants under the intail are entitled to the money, and not the perſonal repreſentative. *Rook* v. *Warth*, 1 *Veſ.* 460. *May* 1750.

21. Books are not heir looms, but the property of the firſt taker tenant in tail. 2 *Veſ.* 121. *January* 1750. *Duke of Bridgwater* v. *Egerton.*

22. Heir general, or by cuſtom, not diſinherited by implication. *Byas* v. *Byas*, 2 *Veſ.* 165. 1750.

23. An heir muſt recover *at law* againſt deviſee. *Knight* v. *Dupleſſis.* 2 *Veſ.* 362. *July* 1751.

24. Bill by a diſinherited heir diſmiſſed *without coſts.* *Leman* v. *Alie.* *Jan.* 1753. *Amb.* 163.

25. Money left by will to be laid out in land, the truſtee being entitled to the money, lays part of it out in a purchaſe, but afterwards diſcharges that eſtate of the truſt; and, making his will, gives generally, without taking notice of this money, his real and perſonal eſtate to *A.*, who afterwards makes his will, and gives his real eſtate to *B.*, and his perſonal eſtate to *C.* The truſt-money paſſes as perſonal eſtate. *Pulteney* v. *Earl of Darlington*, 1 *Bro. Ch. Rep.* 223. 1783.

26. Teſtator gives legacies, to be raiſed by the means *after pointed out*; then directs an eſtate to be purchaſed, a ſum to be raiſed for maintenance, and the reſidue of *the rents to be applied to raiſe the legacies*: and in default makes the eſtate liable. The legacies are not perſonal, but a charge on the real eſtate; and one of the legatees dying an infant, the legacy ſhall not be raiſed for the adminiſtrator. 3 *Bro. Ch. Ca.* 108. *July* 1790. *Harriſon* v. *Naylor.*

27. The

27. The Chancellor in this cauſe thought that he had authority to order timber decaying on a lunatic's eſtate to be cut; but did not abſolutely decide the point, or whether the produce ſhould be conſidered as real, or perſonal eſtate, and go to the heir, or next of kin. *Ex parte Bromfield*, 3 *Bro. Ch. Rep.* 510. 1 *Veſ. jun.* 453. S. C. *Eaſt.* 1792.

28. Teſtator contracts for a particular eſtate, but dies before the purchaſe is completed; afterwards, from the ſtate of his affairs, the contract is diſſolved: yet the purchaſe-money ſhall not ſink into his perſonal eſtate, but be laid out in other lands to the ſame uſes as he had deviſed the land contracted for. *Whitaker* v. *Whitaker*, 4 *Bro. Ch. Rep.* 31. *July* 1792.

29. When an heir at law is brought by order before the court, though there be no reſulting truſt in his favour, he ſhall have his coſts. *Attorney General* v. *Haberdaſhers' Company*, 4 *Bro. Ch. Rep.* 178. *Hil.* 1793.

30. Timber felled on a lunatic's eſtate, by the committee, by order of the court, the produce is the perſonal eſtate of the lunatic. Bill by the heir at law diſmiſſed. *Oxendon* v. *Lord Compton*, 4 *Bro Ch. Rep.* 397. 2 *Veſ. jun.* 69. S. C. *July* 1793.

31. *A.*, entitled to a ſum of money ſecured by a truſt term, and alſo to another ſum of money under a covenant in her father's ſettlement to convey to the uſe of his eldeſt ſon in fee, ſubject to ſuch ſecond ſum as an additional proviſion for younger children; dies before either of the ſums was raiſed, leaving her brother, a lunatic, her ſole next of kin, and entitled to the eſtates liable to the two ſums; he dies, and held that his heir takes the eſtates diſcharged. 2 *Veſ. jun.* 261. *July* 1793. *Lord Compton* v. *Oxendon*,

32. Teſtatrix, having given real and perſonal eſtate to pay legacies, and the perſonal being ſufficient to pay them, the real eſtate ſhall not be ſold for the next of kin. *Chitty* v. *Parker*, 4 *Bro. Ch. Rep.* 411. 2 *Veſ. jun.* 271, S. C. *July* 1793.

33. As between real and perſonal repreſentatives, their rights are purely legal; and neither has any equity to convert the property. *Walker* v. *Denne*, 2 *Veſ. jun.* 176. *May* 1793.

34. An heir is excluded only by teſtator's giving to ſomebody elſe: for the heir will take what is not diſpoſed of, even againſt the teſtator's intention, 2 *Veſ. jun.* 225. 1793. *Habergham* v. *Vincent*.

35. Perſonal eſtate under marriage articles was to be inveſted in land, or government or other ſecurities; the court, finding it in its original ſtate, conſiders it as perſonal; but part of it having been laid out in land, which was ſettled and afterwards ſold, and the produce inveſted in ſtock till a proper purchaſe of land could be found to be ſettled to the ſame uſes, that was conſidered as land. *Briſtow* v. *Warde*, 2 *Veſ. jun.* 336. *June* 1794.

36. Land deviſed to be ſold; the produce to be applied as after mentioned: if no diſpoſition is made, the heir ſhall take, *Sheldon* v. *Barnes*, 2 *Veſ. jun.* 447. *Aug.* 1794.

37. Teſtator

37. Teſtator gave real eſtates to be ſold, and the produce to be conſidered as part of his perſonal eſtate; and thereout and out of his perſonal eſtate gave legacies to the next of kin, heir and others: he gave other eſtates to be ſold, and the produce to be conſidered from thenceforth as other part of his ſaid perſonal eſtate, and to be diſpoſed of in manner following: he then gave legacies and ſome eſtates ſpecifically, and other legacies out of his ſaid truſt-monies and perſonal eſtate; and gave his executor 1000*l.* to be diſpoſed of according to any *inſtructions he might leave in writing*, and gave all the reſidue of his goods and chattels, perſonal eſtate and effects whatſoever, ſubject to debts, legacies, *&c.* No inſtructions being found, the heir held entitled to the 1000*l.* *Collins* v. *Wakeman*, 2 *Veſ. jun.* 683. *July* 1795.

38. By ſettlement on marriage, reciting an intention to provide for the wife and children, certain tolls were granted for the remainder of the grantor's term, in truſt to raiſe an annuity for the lives of the wife and her mother and the ſurvivor; then reciting that the remainder of the term might expire in the life of the wife or her children, therefore, to make a proviſion for her and her children by the then or any future huſband, the truſtees ſhould be poſſeſſed of the ſaid tolls for the remainder of the ſaid term, upon truſt to raiſe, after the deaths of the grantor and the mother of the wife, 100*l.* annually, to be placed out in the purchaſe of freehold lands or hereditaments, or leaſehold eſtates for two or three lives, as often as a competent ſum ſhould be raiſed for that purpoſe; and, until convenient purchaſes ſhould offer, to be inveſted upon government ſecurities upon truſt; in caſe the wife ſhould ſurvive the term, to pay the rents and profits of ſuch eſtate or eſtates ſo to be purchaſed, or the intereſt, produce, and profits to ariſe from the money ſo intended to be placed out, until ſuch purchaſe ſhould be made, to the wife for life: and, after her deceaſe, to apply the ſaid rents and profits, or intereſt-money, towards the ſupport and maintenance of ſuch child and children of her as ſhould be living at her death, till the youngeſt ſhould be 21; and then to be poſſeſſed of ſuch eſtates ſo to be purchaſed, or of the money ariſing from the annuity not placed out in one or more purchaſe or purchaſes, to the uſe of ſuch child and children, in ſuch ſhares and proportions, payable at 21, as the ſurvivor of the huſband and wife ſhould, by will or deed, direct, limit, or appoint: and in default thereof, to the uſe of all ſuch children, equally to be divided at their reſpective ages of 21; but if ſhe ſhould die without leaving any child or children, or all ſhould die under 21, then to the uſe of the grantor, his heirs, executors, adminiſtrators, and aſſigns, and after paying the ſaid annuities to be poſſeſſed of all the ſurplus money ariſing from the ſaid tolls during the remainder of the term for the uſe of the grantor, his executors, *&c.* From the death of the grantor, who ſurvived the wife's mother, the truſtees received 100*l.* a-year, and laid out in ſtock the ſums received, and the produce. One ſon was the only iſſue; he attained 21 in the life of his mother, and

ſurvived

ſurvived her. The court would not inveſt the fund in land; but held it, with the accumulations from the death of the grantor, and the future payments, as a veſted intereſt in the ſon at 21, and as perſonal eſtate belonging to his adminiſtrator. 3 *Veſ. jun.* 41. 1796. *Swann* v. *Fonnereau.*

39. Eſtate ſold, ſubject to a mortgage, was exonerated in favour of the heir by the perſonal eſtate of the purchaſer, his acts having clearly made it his perſonal debt. *Wood* v. *Huntingford*, 3 *Veſ. jun.* 128. *May* 1796.

40. Mortgaged eſtate deſcends; the mortgagee preſſing, the ſecurity is aſſigned: a mere covenant by the heir upon that occaſion for payment, does not make it his perſonal debt; neither does a mere covenant by the purchaſer of a mortgaged eſtate to indemnify the vendor make it his perſonal debt. *Ibid.* 131.

41. Real eſtate deviſed to be ſold, and the produce diſpoſed of with the perſonal, with a power to direct the fund to be laid out in land: no ſuch direction having been given, it was held perſonal property. *Maberly* v. *Strode*, 3 *Veſ. jun.* 450. *July* 1797.

42. Under the conſtitution of the *Hand-in-Hand* fire-office, the heir, to whom, upon the death of the inſured, the property being freehold deſcended, cannot have the benefit of the policy without aſſignment. *Mildmay* v. *Folgham*, 3 *Veſ. jun.* 471. *July* 1797.

43. Neither an heir at law nor next of kin can be barred by any thing but a diſpoſition. *Pickering* v. *Lord Stamford*, 3 *Veſ. jun.* 493. *Aug.* 1797.

44. Where there was a power to ſell, but the legal eſtate was not deviſed, it deſcended to the heir, till the execution of the power. 3 *Veſ. jun.* 513. *Aug.* 1797. *Warneford* v. *Thompſon.*

45. Money bequeathed to *A.* to remain at intereſt, or to be by him laid out in real eſtates to go with other eſtates deviſed. *A.* being tenant in tail of the real eſtates, and being entitled under an aſſignment of the money from the reverſioner, ſubject to contingent limitations, diſpoſed of the money by will. The court inclined in favour of the diſpoſition, upon the ground that *A.* might have called for the money as abſolute owner: but it was eſtabliſhed upon the option to continue it perſonal eſtate. *Amler* v. *Amler*, 3 *Veſ. jun.* 583. *Jan.* 1798.

46. Deviſe of a copyhold (duly ſurrendered) to *A.* and his heirs in truſt for *B.* and his heirs. Upon the death of *B.* without heirs, the heir of the truſtee has no equity to compel the lord to admit him, and his bill was diſmiſſed, but without coſts. *Williams* v. *Lord Lonſdale*, 3 *Veſ. jun.* 752. *May* 1798.

47. The court will not interfere between repreſentatives by changing the nature of property in execution of a truſt, the object of which has failed. *Croft* v. *Slee*, 4 *Veſ. jun.* 60. *July* 1798.

48. An heir at law has no equity, except to remove incumbrances in the way of his legal title; he cannot call for an inſpection of deeds in the poſſeſſion of the deviſees. *Lady Shaftesbury* v. *Arrow-*

v. *Arrowſmith*, 4 *Veſ. jun.* 66. *July* 1798.—Vide *Ivy* v. *Mekewich*, 2 *Veſ. jun.* 679.

49. If an eſtate is deviſed charged with legacies, which fail, the deviſee, and not the heir, ſhall have the benefit of it. *Reunell* v. *Abbot*, 4 *Veſ. jun.* 811.

50. No equity between the heir or deviſee and the perſonal repreſentative to convert property from the ſtate in which it was found at the death. *Attorney-General* v. *Bowyer*, 5 *Veſ. jun.* 303. 1800.

51. To convert real or perſonal property, as between the real or perſonal repreſentatives, from the ſtate in which it is found at the death, the characters of land or money muſt, by the truſt, covenant, &c. be imperatively and definitively affixed to it: otherwiſe, if there be an option, there is no equity. The bill by the heir, claiming the property as real eſtate, was diſmiſſed without coſts. *Wheldall* v. *Partridge*, 5 *Veſ. jun.* 388. *May* 1800.

52. Whether the Journals of the Houſe of Lords, delivered to a peer, go with the title? *Upton* v. *Lord Ferrers*, 5 *Veſ. jun.* 801. *March* 1801.

24 Vin 279. (S) *Interim Eſtate.* In what Caſes the Heir ſhall take it.

1. WHERE money is given to be laid out in lands, and when bought to be ſettled on ſuch and ſuch perſons; on a bill, the courſe is to direct a purchaſe, and the profits of the money in the mean time to go as land. *Earl of Coventry* v. *Coventry*, 2 *Atk.* 369. *July* 1742.

2. Directions in a will to purchaſe an eſtate, which is afterwards ſwallowed up by an inundation; the money ſhall not go to the executor, but as the rents of the purchaſed lands would have gone. *Ibid.*

3. If there be an executory deviſe of lands, with a proviſo in the will, that the profits, beyond an allowance, ſhall be laid up for the firſt perſon who ſhall be entitled to the lands, when he attains 21, and the teſtator dies, leaving no perſon *in eſſe* to take under the limitations; until ſuch perſon be born, the profits are to be looked upon as an undiſpoſed of reſidue, and deſcend to the heir at law. An if ſuch perſon comes *in eſſe*, and dies, the heir at law is ſtill entitled to the profits, beyond the maintenance, during the infant's life, and to all profits afterwards, till a perſon comes *in eſſe* entitled to an eſtate for life in poſſeſſion. 1 *Veſ.* 268. *Trin.* 1749. *Hopkins* v. *Hopkins*.—Vide *Ca. Temp. Talb.* 44.

4. Deviſe in truſt for the child of teſtator's daughter; if ſhe die without iſſue, over; the intermediate profits, till the contingency happens, accumulate, and deſcend to the heir. *Gibſon* v. *Lord Montfort*, 1 *Veſ.* 490. *June* 1750.

Vide tit. *Deviſe* (R. c), (P. a), *pl.* 2., (N. b), and (O. b), *ſect.* 2. *paſſim.*

(S. 2) *Marriage Portion.* Where it ſhall go to the Heir. [F] 14 Vin 281.

1. WHETHER a portion charged on land be given with or without intereſt, by deed or by will, if the perſon dies before the age at which it becomes payable, it ſhall ſink into the eſtate. 1 *Atk.* 552. *Mich.* 1738. *Boycott* v. *Cotton.*

2. A proviſo in a ſettlement that 1000*l.* ſhall and may be laid out by the truſtees in the purchaſe of lands. Where there is a power to lay out money in land, but the original intention was, that it ſhould be conſidered as money, if not veſted in land, it ſhall not be conſidered as ſuch, and go to the heir. *Stamper* v. *Miller*, 3 *Atk.* 212. *Feb.* 1744.

3. *R. B.*, by articles previous to his marriage, covenanted to lay out 2000*l.* in the purchaſe of lands, and to ſettle the ſame on himſelf for life, and after his deceaſe, on *Mary* his intended wife for life, and after both their deceaſes, to truſtees to ſell, and the money ariſing by ſuch ſale to be divided among the children of the marriage, to ſons at 21, daughters at 21 or marriage, *provided no ſale be made till one of the ſhares become payable.* The purchaſe was made accordingly, afterwards *Elizabeth*, the only ſurviving child, died unmarried, but had attained the age of 21; the abſolute proprietor of theſe eſtates, *Elizabeth*, having taken them as land in her lifetime, and done acts to ſhew that ſhe intended them to be conſidered as real eſtates, they muſt be held as ſuch, and go to the heir. *Crabtree* v. *Bramble*, 3 *Atk.* 680. *March* 1747.

4. Money, by marriage articles to be laid out in land to the uſe of huſband and wife for life, then to the children as they ſhould appoint; in default of appointment, equally; if but one, to that one in tail; reverſion to the huſband in fee. There was one daughter; the truſtee pays the money to her and her huſband; ſhe not being *ſui juris*, nor ſeparately examined; the payment is not ſufficient to make it to be conſidered as money, and the ſiſter of the half blood may claim the reverſion in fee of the father. *Cunningham* v. *Moody*, 1 *Veſ* 174. *Dec.* 1748.

Vide *Portions* (I).

(T) Where he ſhall have the Surplus. 14 Vin. 281.

1. AN executor in truſt for an infant of a leaſe for ninety-nine years, determinable on three lives, on the lord's refuſing to renew but for lives abſolutely, complies, and changes the years into lives; on the infant's death under age and inteſtate, this ſhall be a truſt for his adminiſtrator, and not for his heir. *Witter* v. *Witter*, 3 *P. Wms.* 100. *Hil.* 1730.

2. Deviſe

2. Deviſe of a rent-charge, to be ſold to pay legacies amounting to 800*l.*, and if the rent-charge ſhould ſell for 1000*l.* the teſtator gives a further legacy of 200*l.*; it ſells for more than 800*l.* and leſs than 1000*l.*: the exceſs beyond the 800*l.* belongs to the heir as a reſulting truſt. *Stonehouſe* v. *Evelyn*, 3 *P. Wms.* 252. *Eaſt.* 1734.

3. Teſtator, amongſt other legacies, gives a legacy of 5*l.* to *B.* his brother and heir, makes his wife *C.* his ſole heireſs and executrix of all his lands, tenements, goods, and chattels, to ſell and diſpoſe of the ſame as ſhe ſhould think fit, to pay his debts and legacies. This is a gift to her of the ſurplus in fee, and there is no reſulting truſt for the heir. *Rogers* v. *Rogers*, 3 *P. Wms.* 193. *Ca. Temp. Talb.* 268. S. C.

4. *R. S.*, incumbent of the rectory of *B.*, deviſes his perpetual advowſon, donation, and patronage of the pariſh church of *B.*, and all glebe lands, profits, and appurtenances to the ſame belonging, to *G. S.*, *willing and deſiring* her to ſell and diſpoſe of the ſame to *Eaton* college, and on refuſal, to *Trinity* college, *Oxford*, and on refuſal, to any college in *Oxford*, or *Cambridge*, who will be the beſt purchaſer. There is no reſulting truſt of the advowſon of *B.* to the heirs at law of the teſtator, but a deviſe of the beneficial intereſt therein to *G. S.*, with an injunction only to ſell to particular ſocieties. The general rule, that, where lands are deviſed for a particular purpoſe, what remains after ſuch purpoſe is ſatisfied, reſults, admits of ſeveral exceptions; there can be no conſtructive truſt, but where the intent of the teſtator is apparent: *willing* and *deſiring*, *G. S.* to ſell, *&c.* are more properly words of injunction than truſt; but where a real eſtate is deviſed to *be ſold for* payment of debts, there is clearly a reſulting truſt. *Hill* v. *the Biſhop of London*, 1 *Atk.* 618. *Feb.* 1738.

5. Teſtator deviſes the perpetual advowſon of *S.* to truſtees, upon truſt to preſent his ſon *W.* to this living, and that after the church ſhall next after his death be full of an incumbent, then to ſell the perpetuity, and to apply the profit ariſing from the ſale, firſt for payment of debts, and the overplus he diſtributes in thirds to his daughters: the truſtees preſented *W.* the ſon, who died before the advowſon was ſold, leaving a daughter an infant, who, by her next friend, brings her bill, inſiſting that, after debts and legacies paid, there is a reſulting truſt to the heir at law of the teſtator in the advowſon; but the court was of a different opinion. *Hawkins* v. *Chappel*, 1 *Atk.* 621. *Nov.* 1739.

6. There is no reſulting truſt under the ſtatute of frauds and perjuries, but what is called ſo by operation of law; where an eſtate is purchaſed in the name of one perſon, and the money is paid by another, he has a reſulting truſt; or where it is declared only as to part, and nothing ſaid as to the reſt, what remains undiſpoſed of reſults to the heir at law. *Lloyd* v. *Spillett*, 2 *Atk.* 150. *March* 1740.

7. A bare

7. A bare intention, or even negative words, will not exclude an heir at law from inſiſting on a reſulting truſt. *Cook* v. *Duckenfield*, 2 *Atk.* 565. *May* 1743.

8. Where a legacy was to be paid out of the real eſtate, and the legatee died before the contingency happened on which he was to take, the legacy was held to ſink into the eſtate for the benefit of the heir at law. *Attorney-General* v. *Milner*, 3 *Atk.* 112. *July* 1744.

9. If a child, who has a legacy payable out of land, dies before the contingency happens, it goes to the heir; *à fortiori* if it be given to a ſtranger. *Ibid.*

10. Legacy to the executors of the will, and land deviſed to *C.* to pay 1000*l.* to the executors, the reſidue to a charity; this 1000*l.* is a charge on the real eſtate, which, by the *mortmain* act, is not well diſpoſed of, and reſults to the heir at law. *Arnold* v. *Chapman*, 1 *Veſ.* 108. *July* 1748.

11. If a man by will gives all his worldly eſtate, and all his real and perſonal eſtate, to truſtees, to pay ſeveral annuities and other ſums out of perſonal, and if that be deficient, out of rents and profits of real; and as to the reſidue of real and perſonal, to ſuch children as his daughter ſhall have, equally: if ſhe dies without iſſue, to others; and directs, that on the death of annuitants their annuities ſhall go back to the reſidue, and go to thoſe in remainder over, in caſe his daughter dies without iſſue, otherwiſe to be divided amongſt them equally; the ſurplus rents and profits of the real eſtate accumulate, and do not go to the heir at law; but whether to the daughter's children or to thoſe in remainder over, *quære*. 1 *Veſ.* 485. *Trin.* 1750. *Gibſon* v. *Lord Montford.*

12. The reſulting truſt of a copyhold eſtate, as well as of a freehold, is within the ſtatute of frauds. *Withers* v. *Withers*, *Amb.* 151. *Nov.* 1752.

13. One deviſes his eſtate to be ſold, and gives the reſidue of the money to ariſe by the ſale to a charity, and made a reſiduary legatee, the charity legacy being void, ſhall go to the teſtator's heir. *Gravenor* v. *Hallum*, *Amb.* 643. *March* 1767.

14. *E. C.* conveyed ſeveral ſums of money, ſecured by mortgages, amounting to 60,000*l.*, to truſtees in truſt to be laid out in the purchaſe of lands, to the uſe of himſelf for life, remainder as to ſums, to the amount of 28,000*l.* to his wife for life, remainder to his ſon *R. C.* for life, with ſeveral remainders over, remainder to *T. L.* in fee; and as to ſums, amounting to 23,000*l.* to *R. C.* for life, with ſeveral intermediate remainders; remainder to *T. L.* in fee: and as to one particular mortgage, of 8500*l.*, and ſome leaſehold eſtates to ſecure annuities; the ſurplus to *R. C.* in fee, with power of revocation. By his will he gave theſe leaſehold eſtates, and the mortgage for 8500*l.*, together with another mortgage of 6700*l.*, in truſt to ſecure the annuities; the ſurplus intereſt, or rents of the lands purchaſed, to be paid to *R. C.* for life, and to be ſettled in the ſame manner as his other

eſtates: 1ſt, the mortgages to be conſidered as real eſtates; 2dly, it being *uncertain* which of the limitations they were to follow, they are undiſpoſed of, and paſſed to *R. C.* as heir at law, and from him to his general deviſee *E. C.*, who, having died inteſtate as to real eſtate, they go to her heir at law. *Leſlie* v. *Duke of Devonſhire*, 2 *Bro. Ch. Rep.* 187. *Trin.* 1787.

15. Real and perſonal eſtate being given to truſtees to be ſold, and converted into perſonalty, the truſtees to pay the produce to *A.* for life, without further diſpoſition, the reſidue does not go to the truſtees, as undiſpoſed of, though they were made executors, and one of them had a legacy, but is a reſulting truſt for the heir, for ſo much as was the produce of the real eſtate; and as to the perſonal, for the next of kin. *Robinſon* v. *Taylor*, 2 *Bro. Ch. Rep.* 589. 1 *Veſ. jun.* 44. S. C. *Eaſt.* 1789.

16. The reſidue of a mixed fund, given by a citizen of *London* in *mortmain*, reſults to the heir at law, and next of kin in proportions. *Middleton* v. *Cater*, 4 *Bro. Ch. Rep.* 409. *July* 1793.

17. Real and perſonal eſtate deviſed to the executor in truſt to pay debts and legacies; the reſt and reſidue to himſelf; the only purpoſe for deviſing the real appearing to be to inſure payment of debts, without any intention to diſinherit the heir, it was held only a charge, and that the heir was entitled to the ſurplus of the real eſtate. *Halliday* v. *Hudſon*, 3 *Veſ. jun.* 210. *July* 1796.

18. Deviſe on a future contingency, and no intermediate diſpoſition of the rents and profits; a reſulting truſt for the heir at law. *Attorney-General* v. *Bowyer*, 3 *Veſ. jun.* 725. *March* 1798.

Vide Suppl. tit. *Deviſe* (O. 6), (R. c), *ante*, *Reſulting Truſt* (E).

14 Vin. 286. ## (W) Heirs *ex parte materna* take, in what Caſes.

1. *F. W.*, having an eſtate which came to her *ex parte materna*, on her marriage, conveyed the ſame to truſtees to ſuch uſes as ſhe ſhould direct, with remainder to her own right heirs; by will, ſhe directed the eſtate to be ſold, the money to be laid out in the funds, and the truſtees to permit the huſband to receive the intereſt for life: then (after the deduction of 3500*l.* to uſes which veſted in the plaintiff *A. J.*, and after payment of 1000*l.* to *G. P.*) to pay the reſidue of the purchaſe-money to the three defendants *H.* By codicil ſhe gave the plaintiff, her huſband, a power of appointing the 3500*l.* in caſe *A. J.* ſhould marry without his conſent. *G. P.* died, living the teſtatrix, before the codicil made, but *F. W.*, in the codicil, took no notice thereof. 1ſt, the 1000*l.* is real, not perſonal, and ſhall not go to the executors of *G. P.* (though given to her executors), nor to the perſonal repreſentatives of the teſtatrix, nor yet to the reſiduary legatee of the purchaſe-money, but to the heir at law, *ex parte materna*, (the ſide from which the eſtate came). 2d, the 3500*l.* is veſted in *A. J.*, and the truſtees having laid out a larger ſum by

17*l.*

ing, with intent to appropriate, it is well appropriated; and *Ann Jones* having married once with her father's conſent, his power is gone; and he conſenting to give up his life-intereſt, it was directed to be paid to the truſtees in her marriage ſettlement. 3 *Bro. Ch. Rep.* 128. *Hil. July* 1790. *Hutchinſon* v. *Hammond.*

2. Where the equitable and legal eſtates, equal and co-extenſive, unite in the ſame perſon, the former merges: therefore where the former deſcends, *ex parte paterna*, the latter *ex parte materna*, upon their union the paternal heir has no equity. 3 *Veſ. jun.* 339. *March* 1797. *Selby* v. *Alſton.*

3. Though a real eſtate be deviſed to be ſold, yet if a teſtator has done nothing to exempt the perſonal eſtate, it ſhall be primarily liable: the rule is the perſonal eſtate ſhall be firſt applied, unleſs there be expreſs words, or a plain intention of the teſtator to exempt it, or to give it as a ſpecific legacy. *Walker* v. *Jackſon, July* 1743. 2 *Atk.* 624. *Foley* v. *Percival*, 4 *Bro. Ch. Ca.* 419.

4. Where the perſonal eſtate has been exhauſted in payment of ſpecialty creditors, the widow ſhall ſtand in their place, as to the amount of her paraphernalia upon the real aſſets of the heir at law. 3 *Atk.* 369. *June* 1746. *Snelſon* v. *Corbet.*

5. An advowſon in fee in groſs is aſſets by deſcent to ſatisfy bond creditors. An eſtate *pur auter vie*, though it is deviſed, will be liable to debts by ſpecialty, to contribute in a courſe of adminiſtration. *Weſtfailing* v. *Weſtfailing, March* 1746. 3 *Atk.* 460.

6. Aſſets deſcended on the heir at law muſt be applied to the payment of debts before the lands can be charged which are ſpecifically deviſed. *Powis* v. *Corbet, Aug.* 1747. 3 *Atk.* 556.

7. The executor of a bond creditor of Sir *W. F.*'s brings a bill for an account of his perſonal eſtate, and if it falls ſhort of ſatisfying his debts, prays that a ſufficient part of the real eſtate may be ſold. The real eſtate never having been aſſets of Sir *W. F.*, the lands compriſed in the ſettlement made after his marriage are not liable to his debts by ſpecialty; for they are not ſpecific liens on the land. 3 *Atk.* 631. *March* 1747. *Brown* v. *Danton.*

8. The teſtator deſires all his debts may be diſcharged by his executors, adding, "I mean thoſe only of my own contracting; not thoſe heavier debts by my family;" and gives his perſonal eſtate to his mother, whom he makes executrix, deſiring her to pay all his juſt debts exactly; long after making the will, the mother buys in mortgages charged on his eſtate by his anceſtors, and the ſon covenants to pay the money. The perſonal eſtate is ſtill exempted from the principal and intereſt due on theſe mortgages, which are ſtill a charge on the real. 1 *Veſ.* 51. *Nov.* 1747. *Lenan* v. *Newnham.*

9. The real aſſets of *A.*, who took out adminiſtration to the executrix of *B.*, and adminiſtered *de bonis non* to *B.*, who entered into the uſual bonds to the ordinary, followed by *B.*'s legatees, *Aſbley* v. *Baillie, July* 1751. 2 *Veſ.* 368.

10. The perſonal eſtate ſhall not exonerate the real of a debt not contracted by the party. 2 *Bro. Ch. Ca.* 57. *Eaſt.* 1786. *Earl of Tankerville* v. *Faucet.*

11. Where the teſtator directed his truſtees to poſſeſs themſelves of his *eſtates and ſubſtance*, and to pay his debts, it was held that this was a charge on the real eſtate, and that the aſſets ſhould be marſhalled for the benefit of legatees. 3 *Bro. Ch. Ca.* 347. *Aug.* 1791. *Foſter* v. *Cook.*

12. *A.*, being maſter of both funds, charges a debt, which was perſonal, on the real eſtate; his heir ſhall not have the real eſtate exonerated out of the perſonal. 4 *Bro. Ch. Ca.* 199. *Hil.* 1793. *Hamilton* v. *Worley.* 2 *Veſ. jun.* 62. S. C.

13. Legacy charged upon real eſtate, and payable at a future day, ſinks as to the real eſtate by the death of the legatee before the time of payment, and the aſſets cannot be marſhalled. 3 *Veſ. jun.* 135. *June* 1796. *Pearce* v. *Leman.*

14. *A.* purchaſed an eſtate, ſubject to a mortgage; the perſonal eſtate ſhall not exonerate the real of the mortgage debt, though the purchaſer has given a freſh ſecurity. 2 *Bro. Ch. Ca.* 101—152. *Tweddal* v. *Tweddal.* 1786. *Vide* alſo 4 *Bro. Ch. Ca.* 2—419. and the caſes there cited.

15. To exempt the perſonal eſtate from the payment of debts, the will muſt afford a neceſſary implication, *viz.* that implication which leaves no doubt upon the mind of the judge. *Hartley* v. *Hurl*, 5 *Veſ. jun.* 540. *July* 1800.

Vide letters I and K, titles *Aſſets* (Z. d), *Deviſe*, *Covenant* (D), (G. 2), *Executors* (G. a), (G. a. 5), and other proper titles.

[B] 14 Vin 251.

(F. 5) By Cuſtom. Who.

See *Denn* v. *Spray*, ſtated in Suppl. tit. *Deſcent* (A), *ante*.

14 Vin. 257.

(G. 4) By Limitation. Who *Heirs Female.*

1. THE caſe of *Brown* v. *Barkham* (ſtated in 8 *Vin.* 317. *pl.* 12.) was, in 1741, brought by bill of review before Lord *Hardwicke*, who indeed affirmed Lord *Cowper*'s decree, but was far from following his lordſhip in his reaſons. According to Mr. *Hargrave*, in note 3—*Co. Lit.* 24. b., where that gentleman inveſtigates and defends the doctrine of Lord *Coke*, that a perſon, in order to take by purchaſe under the deſcription of *heir ſpecial*, muſt anſwer both parts of that deſcription, by being actually *heir*, as well as that *ſpecies of heir* denoted by the deſcription (which doctrine is by Lord *Coke* there laid down, in contradiſtinction to the ſpecial heirſhip which the law admits of by *deſcent*); according to this note, Lord *Hardwicke*, in giving judgment, divided the caſe into

into two queſtions; 1ſt, Whether it was an eſtabliſhed rule, that he, who claims as *heir male by purchaſe*, muſt be *generally* heir, as well as neareſt male deſcendant; 2dly, Whether the apparent intention of the teſtator might not create an exception to the general rule. Mr. *Hargrave* then proceeds to ſtate Lord *Hardwicke's* words on the 1ſt queſtion, in which his lordſhip admitted, that the diſtinction between an heir male of the body to take by *deſcent*, who is neareſt male deſcendant of the party claiming through males, and to take by *purchaſe* who muſt be *heir*, as well as a male deſcendant of the body, had been long ago eſtabliſhed; but, as he thought the caſe before him might be determined, without determining that queſtion, he ſhould leave the rule unimpeached, he ſaid, *and found his decree upon the ſecond queſtion*. He then proceeded, adds the annotator, to conſider the ſecond queſtion; and, after ſtating ſeveral authorities to ſhew that there might be exceptions to the general rule, he pointed out the particular circumſtances which might be relied upon in the caſe before him; and, *on account of them only*, affirmed Lord *Cowper's* decree. *Amb.* 8. S. C.

2. In a ſubſequent caſe however, where *A. P.*, and his ſon *J. P.*, upon the marriage of the latter with *B.*, ſettled certain lands to the uſe of *A. P.* and his heirs until the marriage; and afterwards, as to part of the lands, to the uſe of *J. P.* for life, and after intermediate remainders (to the uſe of his wife for life, and of his ſons by her or any other woman ſucceſſively in tail male), *to the uſe of the heirs male of the body of the ſaid A. P.*, remainder to the uſe of the heirs male of the body of *J. P.*, remainder to the uſe of *J. P.*, his heirs and aſſigns; and as to the reſidue of the lands, to the uſe of *A.* for life, and after ſeveral intermediate limitations (to the uſe of *J. P.* for life, and to his wife in part for life, and of the ſons of the marriage ſucceſſively in tail male), to the uſe of *J. P.* and the heirs male of his body, remainder to the uſe of *A. P.* his heirs and aſſigns. *A. P.* died without iſſue male in the lifetime of his father, leaving *B.* his widow, and one daughter, by her, named *Ann*. *A. P.* afterwards, by his will, noticing that, by the death of his eldeſt ſon *J. P.* without iſſue male, part of his eſtate then in his poſſeſſion was, by the ſaid marriage ſettlement, veſted in him in fee ſimple, deviſed the ſaid eſtate to his ſon *W. P.* for life, with remainder to his ſons ſucceſſively in tail male, and for want of ſuch iſſue, to the heirs male of his (teſtator's) body begotten, and for want of ſuch iſſue, to his own right heirs for ever. *A. P.* died, leaving his ſaid granddaughter *Ann* his heir at law, and his ſon *W. P.* who (as well as *J. P.* his deceaſed brother) was the teſtator's iſſue by a firſt wife; and alſo leaving *H. P.* an eldeſt ſon, and ſeveral other children, by his ſecond wife. Afterwards *W. P.* who, at his father's death, was *heir male of his body*, died leaving a ſon, who died leaving a ſon *H. J. P.* who died an infant without iſſue; and no recovery was ſuffered by *W. P.* or his ſon. Upon the death of *H. J. P.*, *H. P.*, the then eldeſt ſon and heir male of the body of *A. P.* by

Upon this caſe, it may be obſerved, that, by the opinion in the former part of the certificate, that *H. P.* would have taken by *purchaſe* if a *third perſon* had been the grantor, the doctrine of Lord *Cowper* in *Brown* v. *Barkham*, that a perſon may take as *ſpecial heir* by *purchaſe*, without at the ſame time filling the character of *heir general*, is affirmed, as well in the caſe of a *deed*, as by the opinion in the latter part of the certificate it is affirmed in the caſe of a WILL.

his ſecond wife, entered upon that part of the eſtate which was, by *A. P.*'s will, deviſed to the heirs male of his body. And afterwards, upon the death of *Ann*, the widow of *J. P.*, *H. P.* took poſſeſſion, *as heir male of the body of A. P.*, of the lands which ſhe had held for her life under the ſettlement. Upon a bill filed by *Ann*, the daughter of *J. P.*, and heir general of *A.*, and her huſband, claiming in her right, *as heir at law and heir of the body of J. P.*, to be entitled, on failure of iſſue male of the whole blood, to that part of the eſtate which was limited by the ſettlement to *J. P.* in fee; and alſo claiming, in her right, *as heir at law of A. P.*, to be entitled to the eſtates of which the reverſion in fee was limited to him by the ſettlement, as not deviſed by his will; a caſe was made for the opinion of *B. R.* upon the queſtions, Whether any and what eſtate paſſed by the ſettlement to the defendant *H. P.*, as heir male of the body of *A. P.* the grantor? And whether any and what eſtate paſſed to the ſaid defendant *H. P.*, as heir male of the body of the ſaid *A. P.* by his will? Upon which the judges certified, they were of opinion, that the defendant *H. P.*, by the ſettlement took *by deſcent, as heir male of the body of A P.* the grantor. That, in caſe a *third perſon* had been the *grantor*, they ſhould have thought that *H. P.* would have taken an eſtate in tail male *by purchaſe*, under the deſcription of *heir male* of *A. P.* And that they were of opinion, that an eſtate in tail male paſſed to the defendant *H. P. as heir male of the body of A. P.* by his will. *Wells* v. *Palmer*, 5 *Burr.* 2615. 2 *Black.* 687. S. C.

3. And in a caſe where *N. N.*, upon his marriage with *M. C.*, ſettled lands to the uſe of himſelf for 99 years, if he ſhould ſo long live, and from and after his deceaſe, to the uſe of truſtees and their heirs, during his life to preſerve contingent remainders; and from his deceaſe, to the uſe of *M. C.* for life, remainder to the uſe of the ſons of the marriage ſucceſſively in tail, remainder (after a limitation for preſerving the eſtate to poſthumous ſons in tail) to the uſe of *the heirs female of the body of* N. N. *to be begotten on the body of* M. *her or their heirs; and for want of ſuch iſſue*, to the uſe of the right heirs of *M.* There was iſſue of the marriage three ſons and ſix daughters. The two younger ſons, and all the daughters except one, named *Ann*, and their iſſue, died in the lifetime of *N. N.* The eldeſt ſon died alſo in his lifetime, leaving iſſue a ſon, who afterwards died in *N. N.*'s lifetime without iſſue, and a daughter, who afterwards married *J. F.* At length *N. N.* died. On theſe facts a caſe aroſe, and was brought on, firſt in *B. R.*, and afterwards in the exchequer, and argued three times in each court. The general queſtion was, whether *Ann*, the ſurviving daughter of *N. N.*, or *A. F.*, his grand-daughter and heir-general, were entitled to recover the premiſes. On this queſtion a variety of points, irrelevant to the ſubject of the preſent ſection, were ſtarted; and ſome of them were ſo diſpoſed of as to bring into diſcuſſion the following point, namely, Whether *Ann*, the daughter, took, under the ſettlement, any eſtate by *purchaſe*, as *heir-female* of

of the body of *N. N.* by *M.* his wife? And judgment was given in both courts in favour of *Ann*, the daughter. *Evans ex dem. Burtenſhaw, MS. Rep.* See accordingly *Harg. note* 2. *Co. Litt.* 164. *a.*

See *Gwynn* v. *Hook*, 1 *Wilſ.* 30. *a.* and Suppl. tit. *Deviſe* (U. 6), and (W. 6) *ante.*

(W. 2) Heir *ex parte materna*. What ſhall be ſaid a *new Purchaſe*; or ſuch an Alteration of Eſtate as to carry the Land, *&c.* to the Heirs of the Father; [*et vice verſâ*]. [B] 14 Vin. 288.

1. TENANT in fee, *ex parte materna* of an equitable eſtate, took a reconveyance of the legal eſtate from the truſtee; and it was held, that the eſtate deſcended on the paternal heirs, as in other caſes of purchaſe. *Doe* v. *Pott*, cited in *Doug.* 773.

2. *A.*, having contracted for the purchaſe of lands, but never taken any conveyance, deviſed his real eſtate to his wife, in truſt to educate his ſon till he ſhould attain 21, and then to convey the ſame to his ſon in fee. The lands, after *A.*'s death, were conveyed by the vendor to *A.*'s widow, who died before the ſon attained 21, leaving the ſon her heir. The ſon afterwards attained that age, and died, having deviſed the land to charitable uſes, which diſpoſition was void by the ſtatute of mortmain. On a queſtion between the heir at law of the ſon, *ex parte paterna* (on which ſide the *equitable* eſtate devolved on him), and his heir at law, *ex parte materna* (on which ſide the *legal* eſtate deſcended on him), it was held, that the equitable eſtate merged in the legal, and both followed the line through which the legal eſtate deſcended, and that therefore the maternal heir was entitled. *Goodright* v. *Wells*, 2 *Doug.* 770.

3. *J. T.* being ſeiſed in fee, upon the marriage of *M.* his eldeſt daughter with *F. L.*, by indenture covenanted to levy a fine, and ſuffer a recovery to the uſe of himſelf for life, remainder to *F. L.* for life, remainder to his daughter *M.* for life, remainder to the firſt and other ſons of *M.* by the ſaid *F. L.* in tail male, remainder to the firſt and other ſons of the ſaid *M.* by any other huſband in tail male; with the ultimate remainder to his own right heirs in fee. A fine was levied, and a recovery ſuffered, to the uſes of this indenture. On the death of *F. L.*, without iſſue male, the ſaid *M.* married Sir *J. B.*, and had iſſue by him a ſon named *Jacob*, who, on the death of his father and mother, became ſeiſed of an eſtate tail in the premiſes by *purchaſe*, under the ſettlement, with the reverſion in fee by *deſcent ex parte materna* (this reverſion having deſcended from *J. T.* the ſettlor upon *M.* the mother of *Jacob*). *Jacob*, in the year 1725, ſuffered a common recovery in the uſual form, having, by a deed of bargain and ſale enrolled, made

made a tenant to the *præcipe*, and declared by the ſame deed, that ſuch recovery ſhould enure to the uſe of himſelf and his heirs; and died without iſſue. Upon the death of *Jacob*, *J. S.* entered into the lands, as heir *ex parte paterna*, againſt whom *J. T.* brought ejectment, claiming as heir to *Jacob*, *ex parte materna*. The queſtion was, Whether, as was contended on behalf of the plaintiff, the recovery operated only as a bar of the eſtate tail, and thereupon let the reverſion in fee which deſcended *ex parte materna* into poſſeſſion; or Whether, as was inſiſted on the other ſide, it either enlarged and continued the eſtate tail to a fee which it paſſed to the recoveror (as ſaid in *Pigg.* 21.), or deſtroyed it, and gave *Jacob* a new eſtate in fee by purchaſe? *Willes* Ch. J. delivered the opinion of the court of *B. R.* in the following words: "Our "opinion is, that *Jacob*, by the common recovery, conveyed a fee "to the recoveror; and, as there cannot be two fees, the rever- "ſion in fee comes too late, ſo that it was not the reverſion that "he conveyed; and we are of opinion, that the uſes ariſe out of "the eſtate-tail which *Jacob* had by purchaſe originally *per for-* "*mam doni*, and not out of the reverſion; and that, after his "death, the lands in queſtion deſcended to the heirs general, and "not to the heirs *ex parte materna*, becauſe he took the eſtate tail "by purchaſe." Judgment for the defendant. And upon an appeal to the houſe of lords, this judgment was, with the unanimous concurrence of the judges, confirmed. *Martin ex dem. Tregonwell* v. *Strachan*, 1 *Stra.* 1179. 1 *Wilſ.* 66. *a.* 4 *Bro. Par. Ca.* 486. 5 *Durnf. & Eaſt*, 107., *note* S. C. See *Abbot* v. *Barton*, ſtated in *pl.* 6. of the ſect. to which this is a ſupplement.

4. A feme covert, being ſeiſed of an eſtate tail by *purchaſe*, with the reverſion *ex parte materna*, and of another by deſcent *ex parte materna*, of which part was copyhold, joined with her huſband in ſuffering a recovery of the freehold eſtates in *C. B.*, and of the copyholds in the court of the manor. It was reſolved, that the operation of a recovery ſuffered of a copyhold eſtate was, as to this point, preciſely ſimilar to that of a recovery ſuffered of a freehold eſtate; as it would lead to perplexity, if different rules were applied to different ſorts of eſtates. That the court was bound to adopt the doctrine laid down in the caſe of *Martin* v. *Strachan*; and therefore, that part of the eſtate in which the perſon who ſuffered the recovery took an eſtate tail by purchaſe, muſt go to the heir *ex parte paterna*; and that, in which ſhe took an eſtate tail by deſcent from the maternal anceſtor, to the heirs *ex parte materna*. *Roe* v. *Baldwin*, 5 *Durnf. & Eaſt*, 104.

House. [G]

(B) In what Caſes it may be broken to enter. By Officers, &c. 14 Vin. 315.

1. A Bailiff, in execution of *meſne* proceſs, may break open the door of a lodger's apartment, having firſt gained peaceable entrance at the outer door of the houſe. *Lee* v. *Ganſell*, 1 *Cowp.* 1.

2. Commiſſioners of bankrupt may break open the houſe of the bankrupt to ſearch for his goods, but not any other houſe, though for the ſame purpoſe. 2 *Show.* 247.

3. An officer cannot juſtify the breaking open an outward door or window, in order to execute proceſs in a civil ſuit. If he doth, he is a treſpaſſer. But if he find the outward door open, and enter that way, or if the door is opened to him from within, and he enter, he may break open inward doors, if he find that neceſſary in order to execute his proceſs. *Foſter C. L.* 319.

4. If a man, being legally arreſted, eſcapeth from the officer, and taketh ſhelter, though in *his own houſe*, the officer may, upon freſh ſuit, break open doors in order to retake him, having firſt given due notice of his buſineſs, and demanded admiſſion, and been refuſed. *Foſter*, 320.

5. And not only in the above, but in every caſe where doors may be broken open, there muſt be ſuch notification, demand, and refuſal, before the parties concerned proceed to that extremity. *Ibid.*

6. *Where the outer door* was a *hatch-door*, the upper part of which was open, but the lower bolted at top and bottom, the officer unbolted the top; and not being able to reach the bottom leapt over it, and unbolted it, and let in the others; it was ruled by *Wilmot* J. that this entry was lawful. *Maxwell* v. *King*, *Reading Lent Aſſ.* 1766. Cited *Eſp. N. P.* 604.

7. But where, in an action for breaking and entering plaintiff's houſe, it appeared that the plaintiff's houſe ſtood in a ſtable yard which was ſurrounded by a wall, there was a hatch-gate which ſtood at the foot of the ſtairs which led to an open gallery, from whence there were doors to ſeveral apartments; at the top of the ſtairs there was a door acroſs that part of the gallery which led to the chamber where the plaintiff was: the defendants, having got into the yard, broke open the door at the top of the ſtairs, and arreſted the plaintiff. *Kenyon* C. J. held, that it was the outer door of the plaintiff's dwelling, and that the arreſt was illegal. *Hopkins* v. *Nightingale*, 1 *Eſp. Rep.* 99.

8. If

8. If *A.* be in poſſeſſion of part of a houſe, and *B.* of the other part, and an officer enter into *A.*'s part, under a writ againſt *B.*'s goods, *which are not there*, *A.* may maintain an action againſt the officer for breaking and entering his *houſe*, for it was his *domus manſionalis*, and the goods of *B.* not being *there*, but in another part of the houſe, affords no juſtification to the officer on entering that part. *Fallon* v. *Anderſon*, *Peake's N. P.* 110.

14 Vin. 318. (C) Stealing out of Houſes, Shops, Out-houſes, &c. How puniſhable. And what be ſaid ſuch ſtealing.

1. IT has been held, that an acceſſary before the fact, that is, a perſon that is not in the ſhop, warehouſe, coach-houſe, or ſtable, at the time the goods are ſtolen, but who waits at a diſtance to receive the goods, is not within the ſtatute 10 & 11 *Will.* 3. *c.* 23.; and yet the words are, that whoever ſhall "aſſiſt, hire, or command another to commit this offence, ſhall be deprived of clergy." *Jonathan Wild's Caſe*, *O. B.* 1 *Leach's C. C.* (*notes*) 21.

2. It is certain, however, that if two or more perſons be together in the ſhop, warehouſe, coach-houſe, or ſtable, at the time the goods are privately ſtolen, aiding and aſſiſting each other to commit the felony, they are all equally guilty. *Caſe of Ann Sheldon and Mary Williams*, *O. B. June Seſſ.* 1785.

3. It is ſettled that the ſtealing of *money* privately from a ſhop, warehouſe, coach-houſe, or ſtable, is not within the ſtatute, for the words are "goods, wares, and merchandizes;" and it has been repeatedly decided that theſe words do not include money, either in *ſpecie* or in bank notes. *Mill's Caſe*, *Leach. Ca. Cr. Law*, 43. 1 *P. Wms.* 267. 2 *Ibid.* 212.

4. It has alſo been decided, that if it appear on evidence that the offender broke open the ſhop, warehouſe, coach-houſe, or ſtable, he ſhall not be ouſted of his clergy; for where any degree of force is uſed to obtain the goods, it excludes the idea of privately ſtealing. *Cartwright's Caſe*, *O. B.* 1726. *Foſter's C. L.* 79.

5. It has been ruled, that if a watchmaker receive the watch of a cuſtomer to repair, and hang it in his ſhow glaſs until it is fetched away by the owner, his ſhop it not, as to watches ſo ſituated, a *ſhop* within the meaning of the ſtatute, but a mere *repoſitory* where the watch was kept for the owner, and not expoſed to ſale by the watchmaker. *Stone's Caſe*, *Ca. Cr. Law*, 375.

6. The 12 *Ann*, *c.* 7. making it a capital offence to ſteal to the amount of 40*s.* does not extend to a perſon's ſtealing to that amount in his own houſe. *E. Thompſon's Caſe*, *Ca. Cr. Law*, 379.

7. And therefore if a wife ſteal the property of a perſon in the houſe of her huſband, it is not a ſtealing in the houſe of another within

within 12 *Ann*, *c.* 7. *Gould's Caſe*, *Ibid.* 257. *Macdaniel's Caſe*, *Ib.* 379.

8. A houſe under repair, but not inhabited, is not the dwelling-houſe of the owner. *Lyon's Caſe*, *Ibid.* 221.

9. It has been held, that the property muſt be taken *in* a ſhop, warehouſe, coach-houſe, or ſtable; for where a chariot ſtood under a gateway which was uſed as a ſhed, in the yard belonging to a coach-houſe, and the glaſſes of the chariot thus ſtanding were privately ſtolen, it was held not within the ſtatute. *John Archer's Caſe*, *May Seſſ.* 1784. *O. B.*

10. A *ready-furniſhed* houſe is not within the ſtat. 3 & 4. *Will. & Mary*, *c.* 9. for ſuch a houſe is not to be conſidered as *lodgings*. *Palmer's Caſe*, *Cr. Caſes*, 782.

11. A houſe, into which the owner has only removed his goods, but has not ſlept in it himſelf, or otherwiſe taken perſonal poſſeſſion of it, is not his dwelling-houſe as to the crime of burglary. *Thompſon's Caſe*, *Cr. Caſes*, 893.

(D) What paſſes by Name of a Houſe. 14 Vin. 318.

1. BY a deviſe of a houſe *cum pertinentiis*, only the garden and orchard will paſs with it; but by the deviſe of an houſe with the land appertaining thereto, the land uſually occupied therewith will paſs. One deviſed that his couſin *A.* ſhould continue to live at his houſe, and be at the charge of keeping the houſe, and the ſervants, and coach-horſes, which the teſtator employed in plowing the ground, and ſpend the corn ariſing therefrom in the houſe; here the land enjoyed with the houſe ſhall paſs to the couſin of *A.* *Blackborn* v. *Edgely*, 1 *P. Wms.* 603.

2. *A.* being tenant for years of a houſe, gardens, ſtables, and coal-pen, bequeathed in the following words, "I give *the houſe I live in* and garden to *B.*" The ſtables and coal-pen, occupied by *A.*, together with the houſe, paſſed without being expreſsly named, though the teſtator uſed them for purpoſes of trade as well as for the convenience of his houſe. *Doe* v. *Collins*, 2 *T. R.* 498.

3. What ſhall be ſaid to paſs *by a deviſe* of a meſſuage or dwelling-houſe only, or of a dwelling-houſe *with the appurtenances*, is purely a queſtion of intention to be collected, as in other caſes of intention, out of the whole will. Thus a deviſe of "meſſuages, "with all houſes, barns, ſtables, ſtalls, *&c.* that ſtand upon or "belong to the ſaid meſſuages," under ſpecial circumſtances, clearly manifeſting the intention of the teſtator to deviſe the lands belonging to the meſſuages, was held to paſs thoſe lands. *Gulliver* v. *Poyntz*, 3 *Wilſ.* 141. 2 *Bl. Rep.* 726. S. C.

4. But unleſs it clearly appear, that the teſtator meant to extend the word "appurtenances" beyond its technical ſenſe, lands uſually occupied with the houſe will not paſs under a deviſe of a meſſuage *with the appurtenances*. *Buck* v. *Burton*, 1 *Boſ. & Pull.* 53.

14 Vin. 319.

(E) What is Parcel of it.

1. IN trover for ten load of timber, the case was, that the defendant had been tenant to the plaintiff, and erected a barn upon the premises, and put it upon pattens and blocks of timber lying upon the ground, but not fixed in or to the ground; and upon proof that it was usual in that country to erect barns so, in order to carry them away at the end of the term, a verdict was given for the defendant. *Culling* v *Tuffnel, at Hereford*, 1694. *Buller's N. P.* 34.

2. Of late many things are allowed to be removed by tenants which would not have been permitted formerly, as marble chimnies, *&c.*; so more strongly in things relative to trade, as brewing vessels, coppers, fire engines, cyder mills, *&c.* The general rule of law is, that whatever is fixed to the freehold becomes part of it, and cannot be moved; but many exceptions have been admitted of late to this general rule; as between landlord and tenant, or between tenant for life, or tail, and the reversioner; but the rule holds still as between heir and executor. *Bull. N. P.* 34. See also 2 *Stra.* 1241. 1 *Atk.* 477. 3 *Atk.* 13. 16. and *Toller's Law of Executors.*

[D]

Hunting.

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14 Vin. 328.

(A) Justification of Trespass.

A PERSON may justify trespass in FOLLOWING a *fox* with hounds over the grounds of another; if he aver that it was the only means of killing the fox, and also if he does no more damage than is absolutely necessary. *Gundry* v. *Feltham*, 1 *Term Rep.* 334. See also 3 *Term Rep.* 259. n. *a.*

See Suppl. tit. *Game, &c.*

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14 Vin. 329.

Hypothecation.

See *post*, Suppl. tit. *Master of a Ship.*

Identitate Nominis. [G]

(D) Proceedings and Pleadings. 14 Vin. 333.

THREE priſoners, under ſentence of death, having broke out of gaol, were afterwards taken, and brought to the bar of the court of King's Bench upon the returns of writs of *habeas corpus*: the Attorney-General prayed that they might be aſked, "What they had to ſay why the court ſhould not proceed to "award execution againſt them upon theſe attainders for the "ſaid felonies." Accordingly they were reſpectively aſked that queſtion: and, being arraigned, they ſeverally denied the identity; and the Attorney-General averred it. And, on counſel being aſſigned the priſoners, he aſked time to take inſtructions from his client: but the court denied it, ſaying, that ſuch iſſues were to be tried *inſtanter*; though the court might, upon circumſtances, give time. Whereupon a jury was immediately impannelled and ſworn. *Rex* v. *Rogers et al. Mich.* 6 *G.* 3. *B. R.* 3 *Burr.* 1809.

(A) Jew. [D] 14 Vin. 333.

1. UPON error in debt upon bond, the bail, being both Jews, were ſuffered to put on their hats while they took the oaths. *Gomez Serra* v. *Munez*, 2 *Str.* 821.

2. Marriages, where both parties are Jews, are excepted out of the marriage act, 26 *Geo.* 2. *c.* 33.

[G]

Imparlance.

24 Vin. 335. (A) Imparlance. And what ſhall be ſaid to be ſuch, and *in what Caſes, and at what Time*, it may be.

1. IN dower, or any other real action, imparlance is not to be given; eſſoigns are ſufficient delay; real actions are not within any of the rules of court concerning imparlances. *Foſter* v. *Kirkley*, *Trin.* 26 & 27 *Geo.* 2. *C. B. Barnes's Notes*, 2.

2. Declaration delivered againſt a priſoner on the laſt day but one of *Eaſter* term. A queſtion aroſe, Whether the defendant was entitled to an imparlance till *Graſt. Trin.* Upon looking into the old rule, touching the delivery of declarations to priſoners, the court were of opinion, that the defendant was not entitled to an imparlance, but muſt plead two days before the eſſoign-day of *Trinity* term, according to that rule. *Bond et al.* v. *Jope*, *Trin.* 6 & 7 *Geo.* 2. *C. B. Ibid.* 224.

3. In an action for defamatory words, importing that the plaintiff was guilty of the murder of *A. B.* defendant moved for an imparlance till the following term, on affidavit that a proſecution was then carrying on againſt the plaintiff for the ſaid murder, and that he would probably be tried before that term; an imparlance was accordingly granted: and the court ſaid, "that imparlances are in the diſcretion of the court, and it may be of "ill conſequence to enter into evidence concerning this murder "in the action for words before the trial for the fact." *Sibſon* v. *Nrvin*, *Hil.* 10 *Geo.* 2. *ibid. id. Co. Rep. C. B.* 139. S. C.

4. There can be no imparlance after a peremptory rule to plead has been given. *Fitzwilliams* v. *The Biſhop of Hereford and the Univerſity of Cambridge*, *Trin.* 13 & 14 *Geo.* 2. *ibid.* 225.

5. Imparlance granted on affidavits that defendant was a lunatic. *Higham's* caſe, 1 *Trin.* 17 & 18 *Geo.* 2. *ibid. id.*

Vid. following *placitum.* 6. If a writ be returnable the firſt or ſecond return of any term, and the defendant puts in bail in time, and the plaintiff declares; but the declaration is delivered without notice to plead, according to the general rule, *Paſch.* 3 *Geo.* 2. the defendant is entitled to an imparlance. *Baker* v. *Barlow and Wife*, *Mich.* 18 *Geo.* 2. *ibid. id.*

7. A writ returnable the firſt return of *Hilary* term in a bailable action; declaration left in the office without notice to plead indorſed thereon; but notice of declaration and to plead was afterwards ſerved on the defendant. The defendant moved for an imparlance

imparlance for want of notice indorſed, which was denied; the notice ſerved on defendant being ſufficient within the rule 3 *G.* 2. *Cam* v. *Gardner*, *Hil.* 19 *G.* 2. *Barnes's Notes*, 226. *Vide* Swinley v. Woodhouſe, Mich. 21 Geo. 2.

ſame book, and page— *à contra*. But ſee the caſe of Gaſcoigne et Ux. v. Brown, Trin. 24 Geo. 2. ibid. p. 227. where it was determined that it is not neceſſary (though uſual) to indorſe the notice on the declaration.

8. When the plaintiff amends his declaration, and pays coſts, the defendant is not entitled to an imparlance, but muſt plead after the rule to plead is out. *Know* v. *Wyche. et al. Eaſt.* 1 *G.* 2. *Prac. Reg. C. B.* 17.

9. An action was removed by *habeas corpus* in *B. R.* the 6th day of *November*; upon the 12th *November* the plaintiff delivered a declaration, and gave a rule to plead. The defendant moved for an imparlance, but not allowed; the court ſaying, that they would not put the plaintiff in a worſe condition than he was in the court below. *Wood* v. *Wenman*, *Mich.* 20 *G.* 2. *B. R.* 1 *Wilſ.* 154. *Vide* Smith v. James, 6 Durnf. & Eaſt's Rep. 752. S. P.

10. If a writ be returnable the laſt day of one term, and the defendant does not juſtify bail until the fourth day of the next term, he is not entitled to an imparlance to the third term, though the plaintiff do not deliver a declaration *de bene eſſe* before the eſſoign day of the ſecond term. *Rolleſton* v. *Scott. Mich.* 34 *G.* 3. *B. R.* 5 *Durnf. & Eaſt's Rep.* 372.

(C) What may be pleaded after Imparlance. 14 Vin. 337.

DEFENDANT cannot plead in abatement after a general imparlance, without obtaining a ſpecial imparlance precedent to the time of pleading, which muſt be within the four days given by the rule to plead. *Threlkeld* v. *Goodfellow*, *Barnes's Notes*, 224. *Prac. Reg.* 1. S. C.

Implication. [B] 14 Vin. 341.

See Suppl. tit. *Copyhold* (S. e), *Deviſe* (N. a), (R. a), *ante*, and other proper titles.

[F]

Incumbrances.

14 Vin. 353. (C) *Bought in by ſubſequent Mortgagees or Incumbrancers.* How far protected.

1. NONE but a *bonâ fide* purchaſer of a *puiſne* incumbrance *without notice* of intermediate ones can tack it to a prior. 2 *Atk.* 52. *October* 1740. *Moirett* v. *Paſke.*

2. A prior mortgagee, who has an aſſignment of a third mortgage as a truſtee only, cannot tack the two mortgages together to the prejudice of intervening incumbrancers. A mortgage may be tacked to a judgment, becauſe the judgment creditor, by virtue of an elegit, may bring an ejectment, and hold upon the extended value, and as he has a legal intereſt in the eſtate, the court will not take it from him; but this rule holds only where the ſame perſon has both judgment and mortgage in the ſame right, and not where he has the judgment in his own right, and the mortgage in another right, as a truſtee only. Where there is a prior mortgagee, who has a puiſne incumbrance, a ſecond mortgagee ſhall not redeem the prior without redeeming the puiſne alſo. And where a mortgagee has a bond as well as a mortgage from the mortgagor, the heir muſt diſcharge the one as well as the other; but where a prior incumbrancer has a bond likewiſe, it ſhall be poſtponed to all other incumbrancers, whether by mortgage, judgment, or ſtatute ſtaple, for he has not the ſame equity againſt a puiſne incumbrancer, as againſt an heir at law, who is liable in reſpect of aſſets. And a prior creditor, who buys in puiſne incumbrance, though he did not give the value, ſhall be allowed the whole; otherwiſe as to a *truſtee, agent, heir at law,* or *executor.* *Per* Lord *Hardwicke,* Chancellor. *Ibid.*

3. A prior mortgagee may tack a judgment to his mortgage, though ſubſequent in time to a ſecond mortgage, provided he has no notice of the ſecond. 2 *Atk.* 352. *July* 1742. *Shephard* v. *Fitley,* 2 *Veſ.* 662. *Anon.*

4. A third mortgagee cannot take in a prior ſecurity, to diſplace a ſecond mortgagee after a decree to account, and before the maſter has made his report. 3 *Atk.* 811. *Auguſt* 1754. *Wortley* v. *Birkhead,* 2 *Veſ.* 571. S. C.

5. Deed of appointment of lands in *Middleſex* poſtponed to a mortgage ſubſequent to, but regiſtered before it. 2 *Veſ.* 413. *July* 1752. *Scrafton* v. *Quincey.*

6. Second mortgagee with notice of a former, but without notice of a truſt charge antecedent to both, of which the firſt mortgagee

had notice, muſt take ſubject to that demand. 2 *Veſ.* 485. *July* 1752. *Earl of Pomfret* v. *Lord Windſor.*

7. The third mortgagee, buying in the firſt mortgage *pendente lite*, ſhall exclude the ſecond. 1 *Bro. Ch. Rep.* 63. *Trin.* 1779. *Robinſon* v. *Daviſon.*

8. Mortgagee may protect himſelf againſt a claim of dower, by taking an aſſignment of an old mortgage term prior to the right of dower. 5 *Veſ. jun.* 130. *December* 1799. *Wynn* v. *Williams.*

Vide tit. *Mortgage.*

(F) Bought in. Redeemable by Purchaſers or Creditors, on what Terms. 14 Vin. 358.

Vide tit. *Mortgage.*

In Cuſtodia. [G]

(C) Of delivering Declarations to Perſons *in Cuſtodia.* 14 Vin. 360.

1. WHERE the defendant is in cuſtody, the declaration muſt be delivered to the turnkey, and not into the office. *Greenhouſe* v. *Clever, Mich.* 8 *Geo.* 1. *B. R. Stra. Rep.* 474. The declaration muſt be delivered to the priſoner or left with the turnkey, though he has appeared by attorney. Clarey v. Watts, 2 Blac. Rep. 786.

2. Where a defendant is in cuſtody, it is neceſſary not only to deliver the declaration to the turnkey of the priſon, but alſo to enter it in the prothonotary's office, before a rule to plead is given. *Sir William Strickland* v. *Hodgſon, Hil.* 8 *Geo.* 2. *C. B. Barnes's Notes*, 372.

3. In a declaration againſt a priſoner in cuſtody of the ſheriff, it muſt be alleged at whoſe ſuit he is detained, purſuant to ſtat. 4 & 5 *W. & M. c.* 21. *Williams* v. *Wills, Hil.* 19 *Geo.* 2. *B. R.* 1 *Wilſ.* 119.

Indictment. [C]

(A) Indictment. Extortion. And Miſdemeanors. 14 Vin. 362.

1 AN under-ſheriff refuſed to execute a *capias ad ſatisfaciendum* till his fees were paid. And, upon motion againſt him, the court ſaid that the plaintiff may bring an action againſt him

for not doing his duty, or might pay him his fees and then indict him for extortion. *Nescott's* case, 1 *Salk.* 330. Vide 2 *Term Rep.* 155.

2. Indictment against defendants for extortion, by compelling an executor to prove a will in the Bishop's Court, and taking fees thereon, knowing the same to have been proved in the Prerogative Court. *Rex* v. *Loggen et Froome.*

3. Where custom has ascertained the toll of a mill, a miller may be indicted for extortion; but in the case of a *new mill*, where the miller is not restrained to any certain toll, the persons resorting to it must comply with the miller's demands; and whatsoever he takes, it is not extortion, because it is the voluntary agreement of the parties. *Rex* v. *Burdett*, 1 *Ld. Raym.* 149.

N. B. The following note to be inserted in the margin to *pl.* 14. of *Old Viner*, p. 364. as over-ruling the case of *King* v. *Crisp.*

But it seems now to be settled, that an indictment will not lie for a *bare trespass*, (as tearing an account). Rex v. Johnson, 1 Wilf. 325. Sayer, 27. For the words *vi et armis* alone are not sufficient. Rex v. Storr, 3 Burr. 1698. Rex v. Atkyns, 3 Burr. 1706. There must be such an actual force as implies a *breach of the peace* to make a *trespass* an indictable offence. Rex v. Baker, 3 Burr. 1731. And this degree of actual force must appear on the face of the indictment. Doug. 153.

4. An indictment for extortion *colore officii*, without shewing
14 Vin. 364. for what it was extorted, held good. 4 *Hawk. P. C.* 26. *f.* 55.

(B) Contempts to Courts.

1. ARRESTING a party while attending an arbitrator under a rule of court, is a contempt of court. 2 *Bl. Rep.* 1110.

2. The defendant, having treated the process of the court contemptuously, an attachment went against him, without a rule to shew cause. *Rex* v. *Jones*, 1 *Str.* 185.

3. It has been adjudged that the trying *a feigned issue*, without the consent of the court, is a contempt for which the parties may be punished by attachment, and the proceedings stayed. *Hoskins* v. *Lord Berkley*, 4 *T. R.* 402.

4. The defendant filed a bill in Chancery to set aside an award, after entering into a rule of court of King's Bench to abide by it; the COURT in this case, as the defendant had smarted severely (by payment of the costs incurred) were unwilling to punish him further by *fine and imprisonment*, and yet, as his contempt was so obstinate, they did not care that a slight sentence should stand upon the record; therefore they waived giving judgment, by *consent*. They said, the attorney and counsel were equally guilty of the contempt, and more criminal, and if it ever happened again they would proceed against *them*. *Rex* v. *Wheeler*, 3 *Burr.* 1256.

5. The court ordered an attachment *nisi* against the town clerk of *Guilford*, and a defendant convicted on the game act, for granting and suing out a replevin of goods distrained for the penalty. But on shewing cause, *Eyre* J. discharged the rule, because it was only a contempt to an inferior jurisdiction of the

justices;

juſtices; and in that caſe *B. R.* never interpoſes. *Rex* v. *Burchett*, 1 *Str.* 567.

6. *Cuſtos brevium* of *C. B.* committed for contempt on not returning an original on a *certiorari*. *Cork* v. *Baker*, 1 *Str.* 63.

7. Revoking a ſubmiſſion to arbitration, which has been made a rule of court, is a contempt. *Per curiam*. *Rex* v. *Burridge*, 1 *Str.* 593.

8. So if a releaſe be procured from a noiminal plaintiff in ejectment. In Mr. *Gibbons'* caſe, he pleaded ſuch a releaſe *puis darrein continuance*, and Lord *Trevor*, who tried the cauſe, ſaid he was bound to allow the plea, if they inſiſted upon it; but at the ſame time told them, he would lay them by the heels; upon which the plea was withdrawn. *Ibid.*

9. Aſſigning for error the death of the plaintiff in ejectment is a contempt, for, *per curiam*, it was to defeat the proceedings inſtituted by the court to try the right. *Moore* v. *Goodright*, 2 *Str.* 899.

10. A copy of a bill of *Middleſex* was ſerved on the defendant whilſt he was attending the ſittings in a cauſe wherein he was defendant. And upon motion againſt the attorney for a contempt, it was contended to be right, becauſe it was not an arreſt, which reſtrained him of his liberty. But the court ſaid, the privilege was deſigned as well to prevent any interruption of the buſineſs of the court, and it was equally a contempt. And they would have committed the attorney if he had not conſented to waive the proceedings and pay coſts. *Cole* v. *Hawkins*, 2 *Str.* 1094.

11. An attachment for contempt granted againſt *Rolfe Bailey*, an attorney, for not obeying a *ſubpœna* on tender of his charges. 2 *Str.* 510. 810. 1054. *Ld. Raym.* 1528. *Barnes*, 33. S. C. and the caſes there cited.

12. A *mandamus* was directed to the two bailiffs; one of which was for obeying the writ, and the other would not, nor join in a return. And the court granted an attachment for contempt againſt both, for they ſaid it would be endleſs to try in all caſes which was in the right, and it would be always uſed for a handle of delay. *Caſe of the Bailiffs of Bridgnorth*, 2 *Str.* 808.

13. Under-ſheriffs held in contempt, and fined and impriſoned, for not properly executing that part of the ſentence of the court which condemned defendant to the pillory. *Rex* v. *Beardmore*, 2 *Burr.* 792.

(C) Concerning (Things done or ſpoke in Court to) Judges. What ſhall be ſaid an Offence puniſhable. 14 Vin. 364.

1. IF an attorney uſe contemptuous words in court, he may be ſuſpended, and ſhall not be reſtored till ſubmiſſion. 1 *Bl. Rep.* 222.

2. The defendant preſented a petition to the common council of *London*, and uſed contemptuous words of this court (*B. R.*) at

the ſame time. For the petition the court granted an information againſt him and thoſe who ſigned it, and for the contempt, an attachment. *Rex* v. *Barber*, *ib.* 444.

Qu. If an attachment goes abſolutely where the contemptuous words ſpoken are ſworn to by one witneſs only; the rule in Chancery requiring two affidavits to deprive the party of the benefit of ſhewing cauſe. *Vide* 2 Str. 1068.

3. For contemptuous words ſpoken of the court, an attachment goes without a rule to ſhew cauſe. *Anon.* 1 *Salk* 84.

Quere, Whether a juſtice of peace can commit for a contempt of him when not ſitting in court? Vide *Petit* v. *Addington*, *Peake's N. P.* 62.

14 Vin. 367.

(E) Conſpirators.

1. IF the parties concur in doing the act, although they were not previouſly acquainted with each other, it is conſpiracy.—Lord MANSFIELD, in the caſe of the priſoners in the King's Bench. See alſo *Rex* v. *Cope and others*, 1 *Str.* 144.

2. On an indictment for wickedly and unlawfully conſpiring to accuſe another of *taking hair out of a bag*, without alleging it to be an *unlawful* and *felonious* taking, Lord MANSFIELD declared, that the indictment was well laid; for the giſt of the offence is the *unlawful conſpiring* to do an injury by a falſe charge. *Riſpal's* caſe, 1 *Blac. Rep.* 368. 3 *Burr*, 1320.

3. An indictment lies for conſpiring to pervert the courſe of juſtice, by producing a falſe certificate, by juſtices of peace, that an indicted highway is in repair, in evidence, to influence the judgment of the court. *Rex* v. *Mawbey*, *E.* 36 *Geo.* 3. 6 *Term Rep.* 619.

4. In ſtating ſuch a crime in an indictment, it is not neceſſary to ſet forth that the defendants knew, at the time of the conſpiracy, that the contents of the certificate were falſe; it is ſufficient that, for ſuch purpoſes, they agreed to certify the fact as true, without knowing that it was ſo. *Ibid.*

14 Vin. 368.

(H) For what Offence (a Man) may be indicted.

1. THERE can be no doubt but that all capital crimes whatſoever, and alſo all kinds of inferior crimes of a *public nature*, as miſpriſions, contempts, diſturbances of the peace, oppreſſions, and all other miſdemeanors whatſoever of a public evil example againſt the *common law*, may be indicted; but no injuries of a *private* nature, unleſs they in ſome way concern the king. 2 *Hawk. P. C.* 210.

2. An indictment lies for obſtructing an officer in the execution of his duty.—In ſuch an indictment for obſtructing an exciſe officer in ſeizing of ſoap, it is neceſſary to ſhew that he had a warrant. *Rex* v. *Brady*, *Exchcq. Cham. M.* 38 *Geo.* 3. 1 *Boſ. & Pull.* 187.

3. Taking

3. Taking up dead bodies, even though for the purpoſe of diſſection, is an indictable offence. *Rex* v. *Lynn*, *M.* 29 *Geo.* 3. 2 *T. R.* 733.

4. Conſtable of the night is guilty of an indictable miſdemeanor in ſuffering a ſtreet-walker, delivered to his cuſtody by one of the nightly watch, to eſcape. *Rex* v. *Bootie*, *T.* 32 & 33 *G.* 2. 2 *Burr.* 864.

5. Indictment lies for refuſing to execute the office of conſtable. *Rex* v. *Lone*, *M.* 5 *G.* 2. 2 *Str.* 920.

6. For not taking upon him the office of overſeer, when appointed; for the diſobeying an act of parliament is indictable upon the principles of the common law. *Rex* v. *Jones*, *M.* 14 *Geo.* 2. 2 *Str.* 1146.

7. For ſaying of a juſtice of peace, "you *are a rogue and a liar.*" WEARG moved, after verdict, in arreſt of judgment, that though the juſtice might have committed him for the contempt, yet the words are not indictable, ſince it is not to be preſumed they would provoke a juſtice of peace to a breach of the peace, which is the reaſon why indictments have been held to lie for words. *Sed per curiam*, the allowing that he might be committed ſhews they were indictable. It is true the juſtice may make himſelf judge and puniſh him immediately; but ſtill, if he thinks proper to proceed leſs ſummarily by way of indictment, he may; the true diſtinction is, that where the words are ſpoken *in the preſence* of the juſtice there he may *commit*; but where it is *behind his back*, the party can be only *indicted* for a breach of the peace. *Rex* v. *Revel*, 1 *Str.* 420.

8. Where a ſtatute forbids the doing of a thing, the doing it wilfully is indictable, although without any corrupt motive. *Rex* v. *Sainſbury*, 4 *T. R.* 457.

9. An indictment lies againſt the overſeer of the poor, for refuſing to receive a pauper removed by order of two juſtices, under 13 & 14 *C.* 2. *c.* 12. *Rex* v. *Davis*, *M.* 28 *G.* 3. 2 *Burr.* 799.

10. Alſo againſt a pariſhioner for not doing his highway labour. It was objected in this caſe, that as a particular remedy is appointed by this ſtatute of 22 *C.* 2. *c.* 12., and that this being a new offence created by that ſtatute, that particular remedy ought to be purſued, and that *indictment* would not lie. Lord MANSFIELD. It was an *offence indictable* before the appointment of the ſummary remedy preſcribed by the ſtat. 22 *C.* 2. Therefore the ſummary juriſdiction is *cumulative*, (although there is another remedy given,) and does not exclude the common-law remedy. *Rex* v. *Boyall*, 2 *Burr.* 834.

11. But indictment lies not upon an act of parliament which *creates* a new offence, and preſcribes a particular remedy. *Rex* v. *Wright*, 1 *Burr.* 543.

12. Where a new offence is created by an act of parliament, and a penalty annexed to it by a ſeparate and ſubſtantive clauſe, it is not neceſſary for the proſecutor to ſue for the penalty, but he

may *indict* on the prior cauſe as for a miſdemeanor. *Rex* v. *Harris*, 4 *T. R.* 202.

13. The ſtat. 26 *Geo.* 3. *c.* 6. *ſ.* 1. enacts, that all perſons going on board ſhips coming from infected places, ſhall obey ſuch orders as the king in council ſhall make, without annexing any particular puniſhment; the diſobedience of ſuch an order is an indictable offence, and puniſhable as a miſdemeanor at common law. *Ibid.*

14. Where two ſets of magiſtrates have a concurrent juriſdiction, and one appoints a meeting to grant ale-licences, their juriſdiction attaches ſo as to exclude the other appointing a ſubſequent meeting: though they may all meet together the firſt day; and if after ſuch appointment the other ſet of magiſtrates meet on a ſubſequent day, and grant other licences, their proceeding is illegal, and the ſubject of an indictment. *Rex* v. *Sainſbury*, *M.* 32 *G.* 3. 4 *T. R.* 451.

15. Indictment lies for carrying on works (as Dr. *Ward's aqua fortis* works), which impregnate the air with noiſome and offenſive ſmells. *Per* Lord MANSFIELD, *unwholeſomeneſs* is not eſſential; it is enough if the ſmell be ſo *offenſive* as to render the enjoyment of life and property *uncomfortable*. *Rex* v. *White and Ward*, *E.* 30 *G.* 2. 1 *Burr.* 333.

16. Indictment lies for ſelling by falſe weights. *Rex* v. *Crookes*, 2 *Burr.* 1841.

17. So for ſelling coals by falſe meaſure. *Rex* v. *Oſborn*, *ib.* (*n*).

18. But ſuch private unfair dealings (unattended with the circumſtances of falſe tokens, or falſe weights and meaſures, or conſpiracy) are *not indictable*; as delivering a leſs quantity of beer for a greater, or ſelling an unſound horſe as and for a ſound one. The true diſtinction is this. In all ſuch *impoſitions* or *deceits*, where *common prudence* is ſufficient to guard a perſon from ſuffering, the offence is *not indictable*, but the party is left to his *civil* remedy; but where ſuch methods are taken to cheat and deceive as a perſon cannot by ordinary care or prudence guard againſt, (as falſe weights and meaſures, or falſe tokens), there it is *an indictable offence*. *Rex* v. *Wheatley*, *H.* 1 *G.* 3. 3 *Burr.* 1125.

19. For not repairing a highway, indictment lies. *Rex* v. *The Inhabitants of Harrow*, 4 *Burr.* 2091. 5 *Ib.* 2700.

20. For obtaining money under falſe pretences, *Vide* ſtat. 30 *Geo.* 2. *c.* 24. See alſo *Young* v. *The King*, in Error. 3 *Term Rep.* 98.

21. An indictment lies for maliciouſly vilifying the memory of one who is dead. But ſuch an indictment muſt allege that it was done with a deſign to bring contempt on the family of the deceaſed, and to ſtir up the hatred of the king's ſubjects againſt them, and to excite his relations to a breach of the peace, otherwiſe it cannot be ſupported. *Rex* v. *Topham*, *H.* 31 *G.* 3. 4 *Term Rep.* 126.

22. Indict-

22. Indictment lies againſt a bankrupt for ſecreting his effects. Vide *Frith*'s caſe, *Caſ. in C. L.* 12.

(H. 3) What Offences are indictable by Statute. 14 Vin. 377.

1. IF a ſtatute enjoin an act to be done, without pointing out any mode of puniſhment, an *indictment* will lie for diſobeying the injunction of the legiſlature. *Rex* v. *Davis, Sayer*, 133.

2. And this mode of proceeding in ſuch caſe is not taken away by a ſubſequent ſtatute, pointing out a particular mode of puniſhment for ſuch diſobedience. *Rex* v. *Smith and others*, 2 *Dougl.* 441.

3. For the court of *King's Bench* cannot be ouſted of its common-law juriſdiction without *negative words*, or *neceſſary implication*. *Cates* v. *Knight*, 3 *T. R.* 442. See *ante*, (H), and *vide* alſo *Hartley* v. *Hooper*, *Cowp.* 524. 2 *Burr.* 805. 834. *Rex* v. *Harris*, 4 *T. R.* 202.

4. The power of two juſtices, under the ſtat. 13 *Geo.* 3. *c.* 78. *ſ.* 16., to order *any highway* to be widened, extends to roads repairable *ratione tenuræ*; and, upon diſobedience to ſuch order, the party may either be proceeded againſt ſummarily under the ſtatute, or by indictment. *Rex* v. *Balme et al.* 2 *Cowp.* 648.

5. Where there is no appropriation of a ſtatute penalty, it is a debt to the crown, and ſuable for in a court of revenue, and not by indictment. *Rex* v. *Malland*, 2 *Str.* 827.

(H. 4) Taken in what County. Where the Offence was done in ſeveral Counties. 14 Vin. 372.

1. IT hath been holden, that if a perſon who has taken goods by *robbery* or *burglary* in one county be indicted for *larceny* of thoſe goods, and they are found to be of the value of ten-pence only, he ſhall have his clergy in the *foreign county*; although if he had been indicted of the robbery in the *proper county*, he would have been excluded from clergy. 1 *Hale*, 536. 1 *Hawk. P. C.* 230. Vide 3 & 4 *Will. & M. c.* 1 & 9.

2. Murders and felonies committed in any part of *Wales*, may be tried in the next *Engliſh* county. *Athoe*'s caſe, 1 *Str.* 553. At the trial of one *Webb*, at Hereford Summer aſſizes, 1782, for ſtealing from a ſhip, ſtranded in Glamorganſhire, an objection was made by the priſoner's counſel, that *Herefordſhire* was not the next *Engliſh* county; but it was over-ruled by the Judge, and *Webb* was convicted and executed.—See the Indictment Cro. Cir. Aſ. 510.

3. It is enacted by 2 *Geo.* 2. *c.* 21. "That where death ſhall "happen in *England* from any cauſe feloniouſly given out of "*England*; or where the felonious cauſe ſhall be given in *Eng*"*land*, and the death enſue in any place out of *England*; an in"dictment thereof found by the jurors of the county in which "*either* the *death* or the *cauſe* of the death ſhall reſpectively hap-

" pen, ſhall be as good and effectual in law, as well againſt the " principals and acceſſaries, as if the offence had been com- " pleted in the ſame county where ſuch indictment ſhall be " found," &c.

4. By 13 *G.* 3. *c.* 31. *ſ.* 4. perſons who ſhall have ſtolen money, &c. in either part of the united kingdom, may be indicted for theft where the property is found upon them.

5. So by *ſ.* 5. the receivers of money, &c. in either part of the united kingdom, knowing, &c. are triable where the property is received, though not originally ſtolen there.

(H. 5) In what Caſes. Where the Thing in which the *Offence* conſiſts is only prepared, or inchoate or intended; but not executed.

1. PER Lord *Holt*. The adviſing one to rob or kill, *without ſomething be done thereupon*, is not indictable. *The Queen* v. *Daniel*, 6 *Mod.* 99. But if a meeting be to rob or kill, it may be indictable. *Ib.*

2. To *perſuade* an apprentice to embezzle his maſter's goods is an indictable offence; but the indictment muſt poſitively aver that he did take away the goods in conſequence of ſuch perſuaſion. *The Queen* v. *Collingwood*. 6 *Mod.* 288. 2 *Ld. Raym.* 1116.

3. *Agreeing* to give a perſon a ſum of money to prove a deed to be forged, for the purpoſe of obtaining a verdict, is a criminal offence. *Rex* v. *Johnſon*, *E.* 30 *C.* 2. 2 *Show.* 1.

4. An information for *attempting* to ſuborn a perſon to prove a deed *falſe*, is good, without alleging that the deed was *true*. *Ibid.*

5. In *Rex* v. *Reſt.* which was an indictment for a conſpiracy to charge a man as the father of a baſtard, it was objected that without an act done it was no crime, and that the indictment alleged nothing but that the defendants conſpired to tell the proſecutor that he was the father of the child of which *E.* was *enſeint*. But judgment was given for the crown. 2 *Ld. Raym.* 1167.

6. The ſame kind of objection in *Rex* v. *Kennerſley and Moor*, where it was urged that bare words, charging *A.* that he *conatus fuit rem veneream habere* with the defendant, and ſo to commit an unnatural crime, were not a ſufficient overt act, without alleging ſomething actually done towards putting the conſpiracy in execution. But the objection was unanimouſly over-ruled, and ſeveral inſtances were mentioned of *attempts* to commit felonies being puniſhed as miſdemeanors. 1 *Stra.* 193.

7. The bare having coining tools in poſſeſſion, with intent only to uſe them, was holden indictable: *per curiam*, here the *intent* is the offence; and the having in his cuſtody, is an act that is the evidence of that intent. *Rex* v. *Sutton*, 2 *Stra.* 1073.

8. The *promiſing* money to a member of a corporation to induce him to vote for the election of a mayor, is an offence for which

which an information will lie. *Rex* v. *Plympton*, 2 *Ld. Raym.* 1377.

9. The ſame principle governed the caſe of *Rex* v. *Vaughan*, where an information was granted againſt the defendant for *attempting* to bribe a privy counſellor to procure him an office in the colonies. 4 *Burr.* 2494.

10. In the caſe of *Rex* v. *Scofield*, it was holden, that the *attempting* to ſet fire to a man's houſe, which is only a miſdemeanor, was itſelf a miſdemeanor *per ſe*, as much as an attempt to commit felony, though differing in degree. There, indeed, was an act done; but another caſe was there cited, before *Adams* B. at *Shrewſbury*, where an indictment charged a defendant with *an attempt* to ſuborn one to commit perjury; which, upon reference to the Judges, was unanimouſly holden to be a miſdemeanor. *Cald.* 397.

11. In an indictment on 37 *G.* 3. *c.* 70. making it felony to endeavour to ſeduce a ſoldier or ſailor from their duty, it is ſufficient to charge *an endeavour*, *&c.* without ſpecifying the means employed. *Rex* v. *Fuller*, *M.* 38 *G.* 3. 1 *Boſ.* & *Pull.* 180.

(H. 8) Good or not in reſpect of the *Place* where or before whom taken, or where the Fact is alleged to be done. 14 Vin. 376.

1. ON an indictment, ſtating that the defendant, late of *Woolhampton* in the county of *Berks*, with force and arms, at the pariſh aforeſaid, in the county aforeſaid, made an aſſault on *J. W. &c.* a motion was made in arreſt of judgment, on the ground that no proper venue was laid. It did not appear where the offence was committed; the indictment only ſtated it to be *at the pariſh aforeſaid*, no pariſh having been before mentioned, *Woolhampton* not being deſcribed as a pariſh. BLACKSTONE *contrà*, inſiſted that it muſt be taken upon the face of the record, that *Woolhampton* was a place from which a *venue* might come; eſpecially as the offence is laid *at the pariſh aforeſaid*, and no other place was before mentioned, which ſhews *Woolhampton* to be a pariſh. But THE COURT ſaid, they inclined to think the objection fatal. They ſaid they could not intend any thing concerning *Woolhampton*, becauſe there was no occaſion on the trial to prove what place it was. But there ought, on the face of the record, to appear ſome certain *venue*; whereas here the offence was only laid *at the pariſh aforeſaid*, and no pariſh was before mentioned. *The King* v. *Mathews*, *H.* 33 *G.* 3. 5 *T. R.* 162.

2. The defendants had been convicted of a *nuiſance*, in erecting buildings, and there making acid ſpirit of ſulphur. The indictment run thus: that "at the PARISH of *Twickenham*, &c. *near* the king's common highway there, and *near* the dwelling-houſes of ſeveral of the inhabitants, the defendants erected," *&c.*

an

an objection was taken in arreſt of judgment, that the indictment was laid *generally* at the PARISH of *Twickenham*, and only ſaid *near* the common highway; but not ſaid to be in the *town* or *village*. But, *per* Lord *Mansfield*, It is *ſufficiently* laid, and in the accuſtomed manner. The very *exiſtence* of the nuiſance depends upon the number of houſes and concourſe of people; and this is *matter of fact* to be judged by the jury. *Rex* v. *White and Ward*, E. 30 G. 2. 1 *Burr.* 333.

3. If there be two vills in a pariſh, the indictment need not ſhew in which of them the defendant lives. *Sayer*, 119.

4. It ſeems to be agreed that a miſtake of the place in which an offence is laid, will not be material upon the evidence on "not guilty" pleaded, if the fact be proved at ſome other place in the ſame county. 4 *Hawk. P. C.* 47. *ſ.* 84.

5. If the fact is laid to be done in a city or county in itſelf, but which are not co-extenſive, it muſt ſay, 'within the city and county of *E.*, *&c.* *Rex* v. *Bunce*, E. 11 G. 2. *Andr.* 162.

6. An indictment againſt the pariſh of *B.* for not repairing a road leading from *A.* to *B.* is *excluſive* of *B.*, and therefore bad; and it is not aided by a ſubſequent allegation, *that a certain part of the ſame highway* in *B.* is in decay, *&c.* *Rex* v. *Gamlingay*, H. 30 G. 3. 3 *T. R.* 513.

14 Vin. 378. (H. 10) Good or not in reſpect of the *Time* when taken, and ſetting forth of the Fact.

1. IT is not neceſſary to mention the *hour* in an indictment. 4 *Hawk. P. C.* 44.

2. In BURGLARY the *hour* is uſually mentioned, in order to ſhew that the offence was committed in the night-time; and in *Rex* v. *Waddington*, *Lancaſter Lent* aſſizes 1771. Mr. Juſtice *Gould* held an indictment for burglary inſufficient becauſe the *hour* was omitted. *Ibid.* (*n*).

3. Where the caption of the indictment ſtates the court of Quarter Seſſions, where ſuch indictment was found, to be held *on an impoſſible day*, it is fatal. *Rex* v. *Fearnley*, 1 *T. R.* 316.

4. Perjury being alleged in the indictment to have been committed in the time of the *late king*, and charged to be againſt the peace of the *now* king, is fatal, and renders the indictment inſufficient, and a *conviction* therefore *reverſed* in the Houſe of Lords, and the defendant diſcharged therefrom. *Rex* v. *Lookup*, 3 *Burr.* 1901.

5. It is agreed, that a miſtake in not laying the offence on the very ſame day on which it is afterwards proved upon the trial, is not material upon evidence. 4 *Hawk. P. C.* 46. *ſ.* 81.

6. *Time* and *place* muſt be added to every material fact in an indictment. *Rex* v. *Hollond*, 5 *T. R.* 607.

7. Though the *time* in a temporary ſtatute *be expired*, yet if it be *continued*, the fact may be laid to be done by virtue of the firſt

law; for when an act is continued, every body is estopped to say it is not in force. *Rex* v. *Morgan*, *M.* 10 *G.* 3. 2 *Str.* 1066.

8. An indictment must be in the present tense, that the jury *do*, and not *did* present. *Rex* v. *Bunce*, *And.* 162.

(K) Uncertainty in the Offence *too general.*

14 Vin. 381.

1. A Common and turbulent brawler, a sower of discord among her neighbours, so that she hath stirred, moved, and incited divers strifes, controversies, quarrels, and disputes amongst his majesty's liege people, *contra pacem*, &c. is too general. None but a barretor and a common scold are indictable by general words. *Rex* v. *Cooper*, *H.* 19 *G.* 2. 2 *Str.* 1246.

2. Indictment against defendant for a nuisance, charging that he *semper levavit vel levari causavit.* And, on demurrer, judgment was given for the defendant, on account of the uncertainty of the charge. *Rex* v. *Stoughton*, *E.* 4 *G.* 2. 2 *Stra.* 900.

3. Charging an officer with a breach of order in not prosecuting a war "with all possible vigour and decision," is too uncertain, even though the charge be made in the very words of the order given to him. *Rex* v. *Hollond*, *E.* 34 *G.* 3. 5 *T. R.* 607.

4. Indictment for words spoken of a justice in the execution of his office, must specify what they were; and, if for obstructing him in his duty, must shew by what act. *Rex* v. *How*, *E.* 12 *G.* 2. *Stra.* 699.

5. On an indictment on 5 *Eliz. c.* 4. if it is averred a trade used in *Great Britain*, instead of *England*, it is bad. *Rex* v. *Lister*, *M.* 1 *G.* 2. 2 *Stra.* 788.

6. An indictment for perjury, not shewing in what manner and in what court the false oath was taken, is insufficient; because, for what appears, it might have been extrajudicial. *Rex* v. *Aylett*, 1 *T. R.* 60.

7. If an indictment be for a forcible entry, there ought to be a positive charge of disseisin. 1 *Ld. Raym.* 610.

8. Indictment *quia male et negligenter se gessit in execution of the office of constable*, quashed for being too general. *Rex* v. *Winteringham*, 1 *Stra.* 2.

9. So, for deceiving one *D.* of several lottery orders, *viz. de scriptis bonis et catallis of* D. *decipiebant et defraudebant. Ib.* 8.

(N) Uncertainty.

14 Vin. 386.

1. *FRANCIS Morris* was indicted as a receiver. The indictment stated, "he the said *Thomas Morris*, well knowing," &c. But the indictment was held good, and the words "the said *Thomas Morris*" rejected as surplusage. *Morris*'s case, *Cases in C. L.* 103.

2. But

2. But where an indictment contained *two counts*, one for ſtealing a *bank note*, and the other for ſtealing a *pocket-book*; and the ſame indictment charged *Mary Graham* with knowingly receiving them, and the ſtealers were found guilty; held bad on the *laſt count only*, and *Mary Graham* was found guilty of *the offence aforeſaid*. This was held bad; for it is uncertain to which offence this finding refers. *Graham*'s caſe, *Caſ. C. L.* 82.

3. So alſo an information charging two diſtinct offences, if the offender is convicted of the *ſaid offence*, it is inſufficient. *Rex* v. *Salomons*, 1 *T. R.* 249.

4. Conviction under 22 *Geo.* 3. *c.* 47. for inſuring a ticket in the lottery, authoriſed by 25 *G.* 3., quaſhed, becauſe the information did not ſtate that it was a ticket *in the ſtate lottery*. *Rex* v. *Trelawney*, *E.* 26 *G.* 3. 1 *T. R.* 222.

5. In an information, the charge that the defendant, under colour of his office of clerk of the market, did illegally cauſe his agents to demand and receive *of ſeveral other perſons ſeveral other ſums of money*, is too general, and for this the judgment was arreſted. *Rex* v. *Role*, 2 *Stra.* 999.

6. An indictment for murder muſt aver that the priſoner gave the deceaſed a mortal wound. *Lad*'s caſe, *Caſes in C. C.* 112.

7. It is an incontrovertible rule, that "*in an indictment nothing material ſhall be taken by intendment or implication.*" 4 *Hawk. P. C.* 31. *ſ.* 60.

8. In a criminal charge, there is no latitude of intendment to include more than is charged; the charge muſt be explicit enough to ſupport itſelf. *Rex* v. *Wheatley*, 2 *Burr.* 1127.

9. In indictments *figures* muſt not be uſed, eſpecially in material parts. *Rex* v. *Haddock*, *Andr.* 145.

10. An indictment for ſelling bread, not having *debitum pondus*, is too general. *Rex* v. *Flint*, 1 *Ld. Raym.* 442.

11. In ſome caſes it is not neceſſary to ſpecify the particular acts which conſtitute the offence. As, in *Rex* v. *Eccles and others*, *M.* 24 *G.* 3. *B. R.* the defendants, who had been found guilty of a conſpiracy, moved in arreſt of judgment, becauſe the indictment merely ſtated that they had conſpired together *by indirect means* to prevent one *H. B.* exerciſing the trade of a tailor, without ſetting forth the means uſed; but the court over-ruled the objection, ſaying that it was ſufficient to ſtate the conſpiracy and its object.

12. So in an indictment on ſtat. 37 *G.* 3. *c.* 70. it is ſufficient to charge the defendant with *having endeavoured* to ſeduce perſons ſerving in his majeſty's forces by ſea or land from their allegiance, and to incite them to mutiny, without ſetting forth the means employed. *Rex* v. *Fuller*, *Boſ.* & *Pull.* 180.

(O) Things of Form. 14 Vin 389.

1. IF the offence be prohibited only by *ſtatute*, the indictment ought to conclude *contra formam ſtatuti*. But an indictment for that which is an offence *at common law*, as for obſtructing the execution of an act of parliament, need not, and ought not to conclude *contra formam ſtatuti*. *Rex* v. *Smith et al. T.* 20 *G.* 3. 2 *Dougl.* 445.

2. In an indictment for an offence at common law, a concluſion of *contra formam ſtatuti* may be rejected as ſurpluſage. *Rex* v. *Matthews*, *H.* 33 *G.* 3. 5 *T. R.* 262.

3. An indictment for a nuiſance might conclude, *ad commune nocumentum* of all the king's ſubjects. 2 *Stra.* 688.

4. Indictment for a riot, and riotouſly taking away two water-engines; after verdict *pro rege*, it was moved in arreſt of judgment that there was no *vi et armis*. *Sed* PER CURIAM, The *riotoſe ceperunt*, *fregerunt*, *et proſtraverunt*, implies a force, and the indictment is well enough. *Rex* v. *Wynd et al.* 2 *Stra.* 834.

5. An indictment finding that a perſon hath feloniouſly broken priſon, without ſhewing the cauſe of his impriſonment, *&c.* by which it may appear that it was of ſuch a nature that the breaking might amount to felony, is inſufficient. 4 *Hawk. P. C. c.* 25. *ſ.* 57. and vide 2 *Stra.* 1226. 1268.

6. In an indictment for perjury, on the 5 *Eliz. c.* 9., the word *wilfully* is eſſential, and muſt be inſerted, becauſe the term *wilful* in the ſtatute is a material deſcription of the offence; but it is not neceſſary in an indictment for perjury at the *common law*. *Cox's* caſe, *Caſes in C. L.* 82.

7. Indictment on the Black Act for ſhooting at any perſon, muſt purſue the words of the ſtatute, and charge the offence to have been done "*wilfully and maliciouſly*;" the omiſſion of theſe words is fatal to its validity. *Davis's* caſe, *Caſes in C. L.* 556.

8. An indictment of felony muſt allege the offence to be done *feloniouſly*. An indictment of burglary muſt lay that the party "*feloniouſly and burglariouſly did break and enter*." High treaſon muſt be laid to be done *traiterouſly*; petit treaſon *feloniouſly and traiterouſly*; for though a party be acquitted of petit treaſon, he may be convicted of murder or manſlaughter. 2 *Hale's P. C.* 184.

(S) Quaſhed. In what Caſes, and for what Faults. 14 Vin. 396.

1. EDWARD *Frith*, a bankrupt, was indicted at the *Old Bailey* Seſſion, 1738, for ſecreting his effects. The priſoner's counſel raiſed four objections to the validity of the indictment, all which the court held to be good; and the indictment, conſequently, vicious. The proſecutor then moved, that the indict-

ment

ment might be quaſhed; but THE COURT ſaid, it was by no means proper to encourage the quaſhing of indictments *after priſoners have pleaded.* The motion was accordingly refuſed; and the priſoner being put upon his defence, an acquittal was entered. *Frith's* caſe, *Caſes in C. L.* 12.

2. The court will not give leave to quaſh an information filed *ex officio* by the Attorney-General. He may ſtop the proceedings upon it by *noli proſequi*, and file another. *Rex* v. *Stratton et al.* 1 *Dougl.* 239.

3. The court may uſe a diſcretion, either to quaſh an indictment on motion for inſufficiency, or put the defendant to demur to it: but after verdict they are bound to arreſt the judgment, if they ſee the charge to be inſufficient. 2 *Burr.* 1127.

4. Motion for the proſecutor to quaſh his own indictment is not of courſe, eſpecially if he has put the defendant to expence, or been guilty of unneceſſary or affected delay. *Rex* v. *Webb*, *E.* 4 *G.* 3. 3 *Burr.* 1468.

5. An indictment for perjury was removed by *certiorari*, and the defendant paid coſts for not going on to trial. The proſecutor afterwards moved to quaſh it, which the court refuſed, unleſs he would ſubmit to pay coſts. *Rex* v. *Moore*, 2 *Stra.* 946.

6. The court will not quaſh an indictment for a nuiſance, but leave the party to demur to it. *Rex* v. *Biſhop*, *E.* 11 *Geo.* 2. *Andr.* 220.

7. An indictment at the quarter ſeſſions for perjury at common law, was quaſhed for want of juriſdiction. *Rex* v. *Bainton*, 2 *Stra.* 1088. *Rex* v. *Fearnley*, 1 *T. R.* 316.

8. In the caſe of felony, if it appear, before the priſoner has pleaded or the jury are charged, that he is to be tried for *ſeparate offences*, the Judge in his diſcretion may quaſh the indictment. 3 *T. R.* 106.

9. Indictment againſt ſix jointly and ſeverally for exerciſing a trade, quaſhed, becauſe there ought to be diſtinct indictments. *Rex* v. *Weſton*, 2 *Stra.* 623.

14 Vin. 400.

(U. 3) Indulgence to Perſons indicted.

1. BUT now, by 20 *Geo.* 2. *c.* 30. it is enacted, "That all "and every perſon and perſons whatſoever, *who ſhall be* "*impeached by the Commons of* Great Britain of any high treaſon, "whereby any corruption of blood may or ſhall be made to any "ſuch offender or offenders, or to any the heir or heirs of any "ſuch offender or offenders, or for miſpriſion of ſuch treaſon, "ſhall be received and admitted to make his or their full defence "by counſel learned in the law, not exceeding two counſel, who "ſhall be aſſigned for that purpoſe, on the application of the "party or parties impeached, at any time after the articles of "impeachment ſhall be exhibited by the Commons."

2. It

2. It is alſo enacted, by 6 *Ann. c.* 21. *ſ.* 11. "That when any "perſon is indicted for high treaſon, or miſpriſion of treaſon, a "liſt of the witneſſes ſhall be produced on the trial for proving "the ſaid indictment, and of the jury, mentioning the names, pro- "feſſion, and place of abode of the ſaid witneſſes and jurors (*a*), "ſhall be alſo given at the ſame time that the copy of the indict- "ment is delivered to the party indicted; and that copies of all "indictments for the offences aforeſaid, with ſuch liſts, ſhall be "delivered to the party indicted, ten days before the trial, and "in preſence of two or more credible witneſſes."

(*a*) The caſe of Lord George Gordon, Hil. term, 21 G. 3. was the firſt which happened ſince this act took effect. The Attorney-General, as the only method of complying with the directions of the act, moved the King's Bench for a rule upon the ſheriff, to deliver to the proſecutor a liſt of the jurymen he *intended* to return upon the pannel, in order that the proſecutor might be enabled to deliver ſuch liſt to the priſoner; and the rule was drawn up accordingly, for the terms of which *vide* Douglas, 591.

3. But it is enacted by 6 *Geo.* 3. *c.* 53. "That nothing con- "tained in the above laſt recited act ſhall anywiſe extend to "any indictment of high treaſon for counterfeiting his majeſty's "coin, the great ſeal, or privy ſeal, his ſign manual or privy "ſignet, or to any indictment of high treaſon, or to any pro- "ceedings thereupon againſt any offender or offenders who, by "any act or acts now in force, is and are to be indicted, ar- "raigned, tried, and convicted, by ſuch like evidence, and in "ſuch manner, as is uſed and allowed againſt offenders for coun- "terfeiting his majeſty's coin."

(W) Abated by what. Miſnomer or Addition. 14 Vin. 403.

1. AT the *Old Bailey*, in *July* Seſſion 1786, *J. G. Semple* was put to the bar to be arraigned on an indictment of larceny. The indictment ſtated, "That *James George Harold*, otherwiſe "*Semple*, otherwiſe *Kennedy*, LABOURER, one chaiſe, called a "poſt chaiſe, of the value of 50*l.*, the goods and chattels of *John* "*Lycet*, feloniouſly did ſteal, take, and carry away," &c. Before the priſoner had pleaded, it was moved to quaſh the indictment, on the ground of informality: the *addition* being placed after the *alias dictus*, and not after the firſt name. The Court, upon the authority of *Staundforde*, *Hale*, and *Hawkins's Pleas of the Crown*, directed the indictment and the priſoner to be detained till the next ſeſſion. *Semple*'s caſe, *Caſes in C. L.* 469.

2. But if the priſoner, on his arraignment, *plead* to the indict- ment, this error is thereby cured. *Hannam*'s caſe, *ib.* (*n*).

3. To a plea of *miſnomer*, which may be pleaded *ore tenus*, the clerk of the arraigns may reply that the priſoner is known as well by the one name as the other. *Dean*'s caſe, *ib.* 535.

4. Sir *Matthew Hale* ſays, there is little advantage comes by theſe pleas to the priſoner; and as to the proſecutor, he recom- mends, as the ſafer way, to allow the plea both as to the ſurname and chriſtian name; for he that pleads miſnomer of either muſt in

in the same set forth what his true name is, and then he concludes himself; and *if the grand jury be not discharged*, the indictment may presently be amended by them, and returned according to the name he gives himself. 2 *Hale's N. P. C.* 238.

[D] 14 Vin. 404.

Indorsement.

Ante, 1 Suppl. tit. *Bills of Exchange*, (H), p. 557. (Q), *ib.* 567.

[D] 14 Vin 407.

Infidels.

Ante, 4 Suppl. tit. *Evidence* (A), p. 201.

[G]

Information.

14 Vin. 408.

(B) For what.

1. FOR attempting to bribe a privy counsellor to procure a reversionary patent of an office grantable by the king under the great seal. *Rex* v. *Vaughan*, *M.* 10 *G.* 3. 4 *Burr.* 2494.

2. For printing and publishing an obscene book. *Rex* v. *Curl*, *M.* 1 *G.* 2. 2 *Stra.* 788.

3. For printing in a newspaper, that *A.*, justice of peace, was scandalously guilty of telling a lie in divers companies, *viz.* "that defendant had asked his pardon for publishing that *A.* was to be married to *W.*;" for giving the lie tends to a breach of the peace. *Rex* v. *Staples*, *T.* 11 & 12 *G.* 2. *Andr.* 228.

4. *Norman*, an attorney, who was a commissioner to take affidavits in *B. R.*, upon an arbitration to end some matter of difference between two persons upon an indictment in that court, examined several persons *ore tenus* upon oath, without putting the matter into writing. *Per tot. cur.* This is such an offence for which

which an information must go. *Rex* v. *Norman, Esq. B. R.* 1 *Wilf.* 7.

5. Information shall go against a justice of peace for committing a man for not paying 1*s.* for discharging his warrant. *Rex* v. *Jones, ibid.*

6. Information was granted for these words in a letter to the mayor of *Richmond, viz.* "I am sure you will not be persuaded "from doing justice by any little arts of your town-clerk, whose "consummate malice and wickedness against me and my family "will make him do any thing, be it ever so vile." *Rex* v. *Waite, ibid.* 22.

7. The court granted an information against the defendant, as for a nuisance, on affidavits of his keeping great quantities of gunpowder, to the endangering the church and houses where he lived. *Rex* v. *Taylor*, 2 *Stra.* 1167.

8. Information granted for illegally impressing and confining a recruit. *Rex* v. *Drew*, 1 *Stra.* 404.

9. For giving a ludicrous account of a marriage between an actress and a married man. 1 *Blac.* 294.

10. If a captain of a man of war refuse to let the coroner come aboard his ship, lying in the body of the county (as in *Portsmouth* harbour), to take an inquisition of one who had hanged himself there, information shall be granted. *Rex* v. *Solguard, And.* 231. *Stra.* 1097.

11. If a justice of peace, without whom the sessions could not be held, voluntarily absent himself, information lies. *Rex* v. *Fox*, 1 *Stra.* 21.

12. So, if he refuse to put the act 1 *G. c.* 13. for taking the oaths, into execution, on application made to him. *Rex* v. *Newton*, 1 *Stra.* 413.

13. Information lies for publishing two distinct libels on two distinct persons, one a libel on his son, the other on his daughter, to discredit and disturb him and them. *Rex* v. *Benfield*, 2 *Burr.* 980.

14. It lies against the judges of an inferior court, for unduly discharging a debtor out of their prison. Attachment also lies; for it is a contempt. *Per Hardwicke* C. J. *Moravia's* case, *T.* 8 *G.* 2. 1 *Burr.* 135.

15. The court granted an information against one for refusing to take upon him the office of sheriff, because the vacancy of the office occasioned an interruption of public justice, and the year would be nearly expired before an indictment could be brought to trial. *Rex* v. *Woodrow*, 2 *Term Rep.* 731.

16. The court will grant a rule *nisi* for a criminal information at the end of a term against a magistrate for malpractices *during the term*, but not for any misconduct before the term. *Rex* v. *C. Smith, M.* 37 *G.* 3. 7 *T. R.* 80.

14 Vin. 413.

(C) In what Cases.

1. *A.*, a girl, is put apprentice to *B.*, a muſic-maſter, by her father, who is bound in 200*l.* for performance of covenants: *A.* is debauched by *C.*, *B.* afterwards diſcharged the indenture, and releaſes the penalty to the father, and gives her up to *C.* without the father's knowledge, who pays him the penalty of 200*l.*, and gives bond that *B.* ſhall have the profits of *A.*'s ſinging that year. *A.* is indentured to *C.*, a gentleman, to learn muſic of him, and covenants *inter alia* "not to quit his apartment." The articles are executed by all but the father; bond from him for *A.*'s performance of covenants is drawn, but not executed, and ſhe goes and lives with *C.* as a kept miſtreſs: information lies againſt *B.*, *C.*, and *D.* the attorney who drew the inſtrument, and was privy to the whole, for a conſpiracy. *Rex* v. *Delaval*, *T.* 3 *G.* 3. 3 *Burr.* 1434.

2. An information lies for contriving to get a young lady out of the cuſtody of her guardian, aſſigned in *Chancery*, and marrying her; though ſhe voluntarily went into a coach prepared for the purpoſe of carrying her off. *Rex* v. *Lord Oſſulſton et al.* 2 *Stra.* 1107. *Andr.* 310. S. C.

3. If a ſtatute makes a thing criminal which was lawful before, an information lies for an attempt to do it; as when going to *France* during a war, without licence, was made high treaſon, an attempt to go to *France* was conſidered a great miſdemeanor, for which an information lay. 3 *Com. Dig.* 520.

4. A criminal information having been granted againſt the defendant, he, before the trial at *niſi prius*, diſtributed hand-bills in the aſſize town, vindicating his own conduct, and reflecting on the proſecutor's. This matter being diſcloſed to the Judge at *niſi prius* by an affidavit, was held a ſufficient ground to put off the trial; and that affidavit being returned to the Court of King's Bench, they granted another information on it againſt the defendant for ſuch criminal conduct, conſidering the affidavit taken at *niſi prius* as taken under the authority of this court. *Rex* v. *Jolliffe*, *T.* 31 *G.* 3. 4 *T. R.* 285.

5. The court will not grant an information againſt a magiſtrate for having improperly convicted a perſon, unleſs the party complaining make an exculpatory affidavit denying the charge. *Rex* v. *Webſter*, 3 *T. R.* 388.

6. A motion was made for an information for *ſending* a *challenge* by letter. Copies only, not the original letter containing the challenge, were produced. The *Court* granted the rule, upon reading the copies only, they being ſufficiently verified. *Rex* v. *Chappel*, 1 *Burr.* 402.

7. For one ſingle act, in uſurping an office, an information lies at law, for puniſhment of the offender, but not on 9 *Ann. c.* 20., which entitles to coſts, and relates only to franchiſes affecting rights between party and party. *Rex* v. *Williams*, 1 *Burr.* 402.

8. If

8. If juſtices hold a petty ſeſſions to ſearch for vagrants, and one confeſſes himſelf ſettled at *A.*, and they remove him thither, and he returns the ſame day, and one of the juſtices preſent at the ſeſſions, without ſummons or oath, convict him; the court will grant an information. *Rex* v. *Angell*, 1 *Burr.* 124.

9. And, in general, information lies for any offences againſt the public good, or againſt the firſt and obvious principles of common honeſty. 4 *Hawk. P. C.* 86. *ſ.* 1.

(E) Proceedings in general.

14 Vin. 415.

1. THE court will not ſtay proceedings in debt on a penal ſtatute after verdict, though no affidavit has been filed that the offence was committed in the county where the action is brought, and within a year before the bringing of it. The ſtat. 21 *Jac.* 1. *c.* 4. only applies to thoſe penal ſtatutes on which proceedings may be had before the juſtices of aſſize, juſtices of the peace, *&c.* *Leigh qui tam* v. *Kent*, 3 *Term Rep.* 362.

2. The court will not grant an information againſt a magiſtrate for having improperly convicted a perſon, unleſs the party complaining make an exculpatory affidavit, denying the fact. *Rex* v. *Webſter*, 3 *T. R.* 388.

3. If five ſeveral rules are obtained for informations againſt five ſeveral defendants, one *joint* information cannot be filed againſt them *on theſe rules*, though it be for a joint offence. *Rex* v. *Heydon*, *H.* 2 *G.* 3. 3 *Burr.* 1270.

4. If there is information for perjury on trial of information for a conſpiracy, and all parties agree, the court, on conſent, may arreſt judgment on the conſpiracy, and quaſh the information for perjury. *Rex* v. *Green*, *Rex* v. *Roper*, 2 *Stra.* 1072.

5. Information may be quaſhed on motion, without demurrer, for defect of juriſdiction. *Rex* v. *Williams*, 1 *Burr.* 385.

6. If the record of an information on a penal ſtatute does not ſet forth all the things done, as required by 18 *Eliz. c.* 5., and it removed by *certiorari* by the proſecutor before defendant has pleaded, it is not amended by theſe things appearing in the return, but all proceedings ſhall be ſtayed on motion. *Rex* v. *Holmes*, 1 *Burr.* 365.

7. Where there is a rule to ſhew cauſe why an information ſhould not be granted, the affidavits, on ſhewing cauſe, may be entitled *The King* v. *A.* (the defendant.) *The King* v. *Jones*, 2 *Stra.* 704.

In the caſe of Rex v. Robinſon, Eſq. Trin. 5 G. 3 B. R. the affidavits produced by the defendants in ſhewing cauſe, were not intitled. Mr. Dunning objected to the reading of them. But the court held that they *might* be intitled *or not*, on the ſhewing cauſe, and the affidavits were read, and the rule diſcharged. *Vide* 2 Stra. 704. NOLAN's *edit. in notis.*

Rex v. *Harriſon*, 6 T. R. 60. agrees with this caſe of *Rex* v. *Robinſon*; and the above caſe of *The King* v. *Jones*, does not contradict either, as it goes only to ſay that intitling the affidavits ſhall not *prevent* their being read in ſhewing cauſe againſt the rule *niſi*. But *Rex* v. *Pierſon*, 313. and *Bevan* v. *Bevan*, 3 T. R. 601. are *contrà*.

8. The defendant, who had been arreſted for penalties under the lottery act, was diſcharged on common bail, becauſe the affidavit to hold to bail was intitled, there being no cauſe then in court. *Rex* v. *Cole*, *E.* 36 *G.* 3. 6 *T. R.* 640.

9. The court refuſed to diſcharge a defendant out of cuſtody, on the ground that the affidavit, on which he had been holden to bail, was intitled in the cauſe. *Clark* v. *Cawthorne*, 7 *T. R.* 321.

10. By *Rules and Orders in the Exchequer*, rule 48. in an information in the *Exchequer* upon ſeizure, *&c.* a ſhort note of the names of the parties, the quality of the goods ſeized, and the day in which the information was exhibited, ſhall be entered in a book of the clerk of the office, to be prepared for ſuch intent.

11. So, in an information upon a penal ſtatute, there ſhall be an entry of the names of the parties, and the day of information. *Rules and Orders in the Exchequer*, Rule 48.

14 Vin. 427.

(F) Pleadings.

1. AN information for mooring a merchant ſhip, at the King's Moorings, on 10 *Ann.*, is good againſt the maſter, though it does not aver that he was on board at the time of the mooring. *Horſeman* v. *Gibſon*, *H.* 3 *Geo. in Sc. Fort.* 32.

2. Information upon a ſtatute muſt ſet forth every thing requiſite to bring the offence within it. As in an information upon the ſtat. 11 & 12 *W.* 3. for having *India* ſilks, it muſt aver that there were warehouſes ſtill continuing at the time of the ſeizure, and that the goods were not delivered out on ſecurity. *Holden* v. *Weedan*, *T.* 1724. *Bunb.* 177.

3. *A.* was ſurety for one of the clerks of *B.* (caſhier of the Exciſe), and entered into a bond for the purpoſe; upon an information of debt upon this bond it was moved for leave to plead double, *viz. non eſt factum*, and conditions performed, which was granted. *The Attorney-General* v. *Snow*, *Hil.* 1721. *Bunb.* 96.

4. On a trial upon an information againſt the defendant for being concerned in unſhipping, *&c.* contrary to the ſtatute 8 *Anne*, it was objected that one *Ruſſell* had been guilty, on an information of the ſame nature for the ſame goods, and was actually in execution in the *Fleet* upon that judgment; and therefore the crown could not have a double ſatisfaction, and quoted *Moore*, 553. *Noy.* 62. *Cro. Eliz.* 480.; and inſiſted that in this caſe an *audita querela* did not lie. REYNOLDS, Ld. Ch. Baron, thought the defendant might have pleaded this matter *puis darrien continuance*; but, however, that *Ruſſell*'s being in execution in the *Fleet*, was not a ſatisfaction to the crown: and ſo the defendant went into evidence, and on proof it plainly appeared that the witneſs for the crown was perjured, ſo Mr. Attorney-General gave it up; and there was a verdict for the defendant. *The Attorney-General* v. *Poppleſtone*, *Hil.* 1731. *Bunb.* 311.

Inhabitants. [D]

(B) What they may do or claim as ſuch, and how. 14 Vin. 420.

1. A Cuſtom for all the inhabitants of a pariſh to play at all kinds of lawful games, ſports, and paſtimes in the cloſe of *A.*, at all ſeaſonable times of the year, at their free will and pleaſure, is good. *Titch* v. *Rawlins*, 2 *Hen. Blac.* 393.

2. The like cuſtom for all perſons for the time being, *being in the ſaid pariſh*, is bad. *Ib.*

3. Action on the caſe againſt the *men dwelling in the county of* Devon, for an injury done to plaintiff's waggon, in conſequence of a bridge being out of repair, which ought to have been repaired by the county. To which two of the inhabitants appeared for themſelves and the reſt of the men dwelling in the county, and demurred. Held that the action did not lie; for they are neither a corporation, nor *qua* a corporation, nor have any corporate fund out of which ſatisfaction can be made. *Ruſſell* v. *The Men of Devon*, 2 *Term Rep.* 667.

It is otherwiſe as to indictments, but this is ſanctioned by unbroken uſage *Per* Ld. Kenyon C. J. *Ib.*

4. No action would have lain againſt the hundred for not keeping watch and ward before the ſtatute of hue and cry, which gives it; they not being a corporation. Semb. *Jackſon* v. *Inhabitants of Carleſworth*, 1 *Term Rep.* 72. See alſo 2 *Wilſ.* 92.

5. A plaintiff recovering damages againſt the hundred, under 9 *G.* 1. *c.* 22., is entitled to his coſts. *Ib.*

See *ante*, 3 Suppl. tit. *Cuſtom* (A), 66. (H), *ib.* 69. *pl.* 7. (I), *ib.* 70. *pl.* 3. And *poſt.* tit. *Preſcription.*

Injunction.

(A) Grantable; in what Caſes to ſtop Proceedings. 14 Vin. 422.

1. AFTER a verdict at law, upon a bond of 20 years ſtanding, an injunction was granted. 3 *P. Wms.* 395. *Mich.* 1735. *Humphreys* v. *Humphreys.*

2. A bill to ſtay defendants, who had an intereſt in the manor of *Tunbridge*, from proceeding at law againſt the plaintiffs, for building

building houſes on the manor without leave, and praying that defendants might accept of ſuch a compenſation as the court ſhould think reaſonable; the court refuſed to continue the common injunction till the hearing. 1 *Atk.* 285. *Mich.* 1738. *Conyers* v. *Lord Abergavenny.*

In the above caſe, a bill brought by the defendants had been diſmiſſed, on a ſuggeſtion of the plaintiffs, that it was matter determinable at law.

3. Whilſt ſuits were depending here, the plaintiffs indicted the defendant's agents at the ſeſſions, *where they themſelves were judges*, for a breach of the peace. The plaintiffs were ordered not to proceed at the ſeſſions till anſwer or further order. *And it was ſaid by the Chancellor* Hardwicke, *that there was no reſtraining power in this court over criminal proſecutions, but that where an action of treſpaſs will lie, the Attorney-General would grant a* noli proſequi *to a criminal proſecution, and that* pendente lite *this court would ſtop an action of treſpaſs* vi et armis, *or an indictment for a forcible entry, pending a ſuit here for the quieting the poſſeſſion.* 2 *Atk.* 302. *May* 1742. *Mayor of York* v. *Pilkington.*

4. Where bond creditors of the anceſtor proceed at law againſt the heir, and others bring a bill in equity on behalf of themſelves and the other creditors, and obtain a decree, an injunction ſhall iſſue againſt thoſe ſuing at law, unleſs they have firſt obtained judgment. 1 *Veſ.* 211. *Hill.* 1748. *Martin* v. *Martin.*

5. An injunction was granted to ſtay trial in actions at law commenced by a corporation for petty cuſtoms, till anſwer, as a defence at law might ariſe out of the anſwer. 2 *Veſ.* 620. *Trin.* 1755. *Anon.*

6. An injunction, obtained to ſtay proceedings at law againſt the principal, was extended to ſtay proceedings on the bail bond. *Amb.* 32. *December* 1744. *Stone* v. *Tuffin.*

7. An injunction was awarded to ſtay proceedings at law for an annnity, on paying all the arrears into court. *Amb.* 242, *Hill.* 1754. *Searle* v. *Lord Carpenter.*

8. Leſſee of a houſe covenants to repair, with exception as to fire; the houſe is burnt; the leſſee, having inſured and received the inſurance money, neglects to rebuild, and brought an action for rent, and was reſtrained from proceeding. *Amb.* 619. *Trin.* 1764. *Brown* v. *Quilter.*

9. A bond was given for the enjoyment of a collateral matter, an injunction iſſued againſt an action commenced upon the bond for the penalty, and an iſſue of *quantum damnificatus* was granted, that the actual damage incurred only might be paid. 1 *Bro. Ch. Rep.* 418. *Mich.* 1784. *Sloman* v. *Walter.*

10. Injunction granted to reſtrain defendant from recovering a demand from one of the plaintiffs, he having repreſented, on a treaty of marriage with his daughter, that there was no ſuch demand exiſting. 1 *Bro. Ch. Rep.* 543. 1782. *Nevile* v. *Wilkinſon.*

11. The

11. The eſtates of loyaliſts in *America* were, under the forfeiting acts, confiſcated and veſted in the ſtates, and to be ſold for the payment of the debts of ſuch loyaliſts convicted as therein mentioned. This is no ground for an injunction to ſtay an action here upon a bond given by ſuch loyaliſt before he was convicted. 2 *Bro.* 11. *Mich.* 1785. *Kempe* v. *Antill.*

12. The plaintiff entered into a contract with the juſtices of the peace of the county of *Northumberland*, at the quarter ſeſſions, to build a bridge. The ſum agreed for was paid, and the plaintiff entered into a bond for the performance of the article: the bridge was built, and deſtroyed by a flood; and the plaintiff refuſing to rebuild, having been adviſed by able engineers that no bridge could be built upon the ſcite, which could ſtand, an action was brought againſt him upon the bond; and an injunction was awarded, and an iſſue *quantum damnificatus* ordered, the ſum mentioned in the bond being a penalty. 2 *Bro. Ch. Rep.* 341. *Trin.* 1783. *Errington* v. *Ayneſley.*

13. There being a decree for payment of debts, *&c.* on the ſuit of the truſtees, though the parties had not proceeded under that decree, a creditor was reſtrained from proceeding at law againſt the executor. 1 *Bro. Ch. Rep.* 183. 1782. *Brooks* v. *Reynbolds.*

14. Repreſentatives of mortgagee, after foreclоſure, ſell the mortgaged premiſes; and the amount not being ſufficient to pay the debt, bring an action on the bond, injunction to reſtrain their proceeding refuſed. 2 *Bro. Ch Rep,* 125. *Tooke* v. *Hartley.*

15. Where the defendant is abroad, a motion for an injunction to ſtay proceedings at law muſt be on ſpecial ground. 2 *Bro. Ch. Rep.* 640. 1789. *Revet* v. *Braham.*

16. Where the plaintiff at law is abroad, and an injunction bill filed, and motion that ſervice of the ſubpœna upon the attorney at law ſhould be good ſervice, an affidavit of the truth of the equity of the bill muſt accompany the motion for a *ſubpœna.* 3 *Bro. Ch. Rep.* 12. 1789. *Delancey* v. *Wallis.* See alſo 3. *Bro.* 23. *Burke* v. *Vickars,* S. P.

17. Where there is a bill filed againſt an executor, and a decree *quod computet,* and that creditors ſhall come in; if a creditor brings an action, an injunction ſhall iſſue to ſtay trial, as well as execution; but if the action be brought before the bill filed, and he chooſes to diſcontinue, he ſhall be allowed to prove his coſts at law in addition to his debt. 3 *Bro. Ch. Rep.* 23. 1789. *Goate* v. *Fryer.*

18. Upon an interpleading bill, it was doubted whether the money ought not to be actually brought into court before the motion for an injunction, though the practice ſeems to have been, that it has been held time enough, if brought in upon ſhewing cauſe againſt diſſolving the injunction. 3 *Bro. Ch. Rep.* 36. 1789. *Dungey* v. *Angove and others.*

19. Action at law on a bond given to a truſtee, only reciting that the obligor was (on the reſignation of obligee's *ceſtuique truſt*)

appointed to an office, not restrained by injunction; but may be pleaded at law, in order to try whether the consideration was corrupt. 3 *Bro. Ch. Rep.* 57. 1790. *Thrale* v. *Moss.*

20. The practice of a court of law, compelling a plaintiff on a bond not to take execution beyond his real debt, does not oust a court of equity of its jurisdiction in awarding an injunction. 3 *Bro. Ch. Rep.* 73. 1790. *Codd* v. *Woden.*

21. An injunction to stay execution and trial, not granted as one motion. 3 *Bro. Ch. Rep.* 87. 1790. *Wright* v. *Braine.*

22. Affidavits read upon an application for an injunction to restrain execution on a verdict at law, after answer put in. 3 *Bro. Ch. Rep.* 463. 1792. *Isaacs* v. *Humpage.* See *Bunb.* 30. *Walter* v. *Russel.*

23. Where a bill has been filed for an account, and a creditor comes in before a Master, but afterwards brings an action, a court of equity will enjoin; but where the defendant has not applied in the first instance, it shall be without costs. 4 *Bro. Ch. Rep.* 163. *Hil.* 1793. *Hardenstle* v. *Chettle.*

24. An injunction extends to prevent a suit against the sheriff, for not paying over money levied by him in the original action before the injunction issued. 2 *Anstr.* 556. *East*, 35 *G.* 3. *Bolt* v. *Stanway.* But, in order to bring himself within the protection of the order, the sheriff must comply with the terms of it, by bringing the money into court. *Ibid.* 569.

25. An injunction cannot be extended to reach a person not a party to the suit. 2 *Anstr.* 521. *Hil.* 35 *G.* 3. *Dawson* v. *Princeps. Gadd* v. *Wooval. Ibid.* 555. S. P.

26. Where one destrained, and on replevin made three conusances as bailiff to different persons, an affidavit, stating the only claim to be under one of the persons, and that he had absconded insolvent, will not entitle the plaintiff to an injunction. 3 *Anstr.* 636. *Mich.* 36 *G.* 3. *Nicholls* v. *Phillips and others.*

27. On a motion for an injunction, the plaintiff cannot read affidavits to contradict the answer. 3 *Anstr.* 658. *Hil.* 36 *G.* 3. *Sommervile* v. *Buckle.*

28. *A.* sued at law on a policy of insurance, which he had made as agent for *B.*, on a motion for an injunction on affidavit of *B.*'s residing abroad, *A.* must have notice. 3 *Anstr.* 686. *Hil.* 36 *G.* 3. *Beachcroft* v. *Gordon and others.*

14 Vin. 425. (A. 2) Grantable, in what Cases, *to stop Execution*, or *to stay* Waste.

1. UPON a contract to assign to *Smith* 300*l.*, the third subscription in the *S. Sea*, on the 28th of *August*, *Smith* covenanted upon assigning to pay 1050*l.*, for which he gave a bond, and judgment was obtained thereupon in the common pleas; *Smith* filed a bill for an injunction, and obtained it, because the money for which the bond was given was the consideration of the contract;

contract; and this being a mutual agreement, they ought not to be put to croſs actions at law. *Bunb.* 75. 1721. *Smith* v. *Nottingham.* *Vide Bunb.* 84. *Aubrey* v. *Fitzhugh*, as to *S. Sea* Contracts.

2. Where the crown has only a bare reſervation of royal mines, it cannot grant a licence to any perſon to come upon another man's eſtate to ſearch for mines; but when mines are open, the crown can reſtrain the owner of the ſoil from working them, and can either work the mines itſelf, or grant a licence to others to work them. 2 *Atk.* 19. *Jan.* 1739. *Lyddal* v. *Weſton.*

3. If a man ſuffer another to build upon his land, without ſetting up a title till afterwards, the court of chancery will oblige the owner to permit him to enjoy it quietly. 2 *Atk.* 83. *Nov.* 1740. *East India Company* v. *Vincent.*

4. A rector may cut down timber for the repairs of the parſonage houſe or chancel, but not for any common purpoſe. He is alſo entitled to *botes* for repairing barns and outhouſes belonging to the parſonage; and an injunction iſſued to reſtrain the rector from cutting down timber in the church-yard till the hearing, except for thoſe purpoſes. 2 *Atk.* 217. *Nov.* 1741. *Strachy* v. *Francis.*

5. The court will not grant an injunction to reſtrain a perſon from committing a treſpaſs, where it is *temporary* only; otherwiſe if it has continued ſo long as to become a nuiſance. 3 *Atk.* 21. *Jan.* 1743. *Coulſon* v. *White.*

6. Limitation to *A.* for life, to truſtees to preſerve contingent remainders, &c. to the firſt, &c. ſons of *A.* in tail; remainder to *B.* for life, remainder to his firſt, &c. ſons in tail. Reverſion in fee to *A.*, who cuts down timber, againſt whom *B.* brought his bill to ſtay waſte. Though *B.* has no right to the timber, yet as he has an intereſt in the maſt and ſhade, if *A.* ſhould die without ſons; and as *B.* could not maintain an action, not having the immediate remainder, the injunction was continued. 3 *Atk.* 94. *June* 1744. *Perrot* v. *Perrot.*

7. A bill in this court to reſtrain nuiſances extends only to ſuch as are nuiſances at law: and the fears of mankind, though reaſonable, will not create a nuiſance; and a motion for an injunction to reſtrain the building the ſmall-pox hoſpital was refuſed. 3 *Atk.* 756. *Dec.* 1752. *Anon.* *Baines* v. *Baker*, *Amb.* 158. S. C.

8. Injunction on a forcible entry granted againſt the commiſſioners of the turnpike for digging gravel in land leaſed to the plaintiff for 21 years, and converted into a garden. 1 *Veſ.* 188. *Dec.* 1748. *Hughes* v. *Truſtees of Morden College.*

9. Jointreſs gives leave to the next in remainder for life without impeachment of waſte, to cut timber on the jointure eſtate; he dying without iſſue, the remainder-man over in tail having acquieſced in, and encouraged the ſo doing, ſhall be reſtrained from bringing an action of waſte againſt the jointreſs. 1 *Veſ.* 396. *Feb.* 1749-50. *Aſton* v. *Aſton.*

10. If a ſole right to a ferry appear upon record, the court will grant an injunction before anſwer, to reſtrain others from uſing the ferry-boats there; but there muſt be full affidavits to ſhew that the

the plaintiffs keep up ſufficient number of ferry-boats. 1 *Veſ.* 476. *June* 1750. *Anon.*

11. Injunction granted againſt ſtopping up ancient lights till the right be tried at law, and ordered the ſcaffold and boards to be pulled down. 1 *Veſ.* 543. *Auguſt* 1750. *Ryder* v. *Bentham.*

12. Injunction to re-erect a nuiſance denied. 2 *Veſ.* 193. *Feb.* 1750. *Anon.*

13. Injunction to ſtay building muſt be on ſtopping ancient lights, for which there is a preſcription, or on agreement. 2 *Veſ.* 451. *July* 1752. *Morris* v. *Leſſees of Lord Berkeley.*

14. Injunction not granted to ſtay the uſe of a market, for there are remedies at law, by *ſcire facias* or action. Query, After the right has been eſtabliſhed at law. 2 *Veſ.* 415. *Mich.* 1752. *Anon.*

15. Termor of a ground rent may have an injunction againſt his leſſee to ſtay waſte. *Amb.* 105. 1750. *Farrent* v. *Lee.*

16. Tenant for life without impeachment of waſte enjoined from cutting down trees planted for ſhelter or ornament, or in viſtoes, planted walks, &c. *Amb.* 107. *May* 1751. *Obrien* v. *Obrien.*

17. The patron of a living may have an injunction againſt an incumbent to ſtay waſte: ſo may the Attorney-General againſt a biſhop. *Amb.* 176. *Knight* v. *Moſeley.*

18. The Court of Chancery will not grant an injunction to ſtay the working of a colliery, but in caſe of the breach of an expreſs covenant, or of an uncontroverted miſchief. *Amb.* 209. *Jan.* 1754. *Anon.*

19. Demurrer to a bill for an injunction to reſtrain the defendants, who were leſſees of the plaintiff, from injuring his fiſh-ponds, overruled. 2 *Bro. Ch. Rep.* 64. *Earl of Bathurſt* v. *Burden.* 17 *May* 1786.

20. Bill by the patroneſs, the ordinary, biſhop of the dioceſe, and churchwardens of the living of *Oxted*, againſt the widow of the late incumbent for an injunction to ſtay waſte, during the vacancy, which after ſome heſitation the Lord Chancellor granted. 2 *Bro. Ch. Rep.* 552. *Feb.* 1789. *Heſkins* v. *Featherſtone.*

21. Injunction to ſtay waſte refuſed, where the plaintiff and the defendant in poſſeſſion were tenants in common; but granted on affidavit of the defendant's inſolvency. 3 *Bro. Ch. Rep.* 621. *May* 1792. *Smallman* v. *Onions.*

22. Where there was great delay on the part of the vendor, an injunction to ſtay an action at law brought againſt the auctioneer for the depoſit was refuſed. 4 *Bro. Ch. Rep.* 496. *Mich.* 1793. *Lloyd* v. *Collett.*

23. An injunction was granted to ſtay an action at law brought againſt the auctioneer for the depoſit, although the eſtate ſold was repreſented as freehold, with leaſehold adjoining, and was in fact almoſt all leaſehold, and although there had been great delay in making out the plaintiff's title. 4 *Bro. Ch. Rep.* 491. *Feb.* 1794. *Fordyce* v. *Ford.*

24. An injunction was granted *before* anſwer to reſtrain the defendant from proceeding farther in digging a ditch, but the court would not order it to be filled up till *after* anſwer. 1 *Veſ. jun.* 140. *Anon.*

25. Injunction was moved for to reſtrain the Foundling Hoſpital from building on land belonging to and ſurrounding the hoſpital, on the grounds that the original deſign was that the hoſpital ſhould be in the country. 2d, The riſk of the undertaking. And, 3dly, that the contracts which the truſtees had made with the builders were improvident. The injunction was refuſed, as there was no breach of truſt, or probability of it made out. 2 *Veſ. jun.* 43. 1793. *Attorney* v. *The Governors of the Foundling Hoſpital*, 4 *Bro.* 165. S. C.

26. Tenant for life having granted a leaſe of coal mines amounting to a forfeiture, cannot join the remainder-man in a bill for an injunction. 3 *Veſ. jun.* 3. *Nov.* 1795. *Wentworth* v. *Turner.*

27. Where a tenant for life, ſubject to waſte, has *ſold* timber, &c. he cannot have an injunction againſt the vendee to prevent his cutting it. *Ibid.*

28. Where a tenant defending an ejectment brought by his landlord makes default at the trial, and, during the interval, does all the miſchief he can, by committing breaches of covenants and wilful waſte, an injunction will be granted on motion, or, in the vacation, on petition; but where no ejectment had been brought, it was refuſed. 5 *Veſ. jun.* 259. *Feb.* 1800. *Lathrop* v. *Marſh.*

29. Injunction was granted to reſtrain the landlord from cutting ornamental trees in a lawn during the term, upon his conduct, amounting to approbation of and conſent to the tenant's plan of improvement in laying out the lawn. 5 *Veſ. jun.* 688. *Dec.* 1800. *Jackſon* v. *Cator.*

30. Sending a ſurveyor to mark out the trees was held a ſufficient ground for an injunction. *Ibid.*

31. Motion to reſtrain the defendant, widow and adminiſtratrix of the inteſtate, from diſpoſing of his property in the funds, on the ground of having ſquandered the real eſtate, of which ſhe was in poſſeſſion for the plaintiffs, the children. Granted as to two thirds of the property, the ſhare of the plaintiff. 1 *Anſtr.* 174. *Eaſt.* 33 *G.* 3. *Rogers* v. *Rogers.*

32. Where the principal diſpute is as to the *locality* of lands of each, equity will not allow the defendant, after recovering in ejectment, which does not aſcertain the land by metes and bounds, to take out execution upon whatever part he ſhall chooſe. 1 *Anſtr.* 184. *Eaſt.* 33 *G.* 3. *Hardcaſtle* v. *Shafto.*

33. When lands are confuſed, and the plaintiff at law recovers under an inſtrument, which ſtates the whole to be 25 acres, and that 18 belong to him, whereas in fact the whole is 21 acres only, equity will injoin him from taking out execution for 18 acres; he muſt abate in proportion. *Ibid.*

34. The court will not interfere by injunction (in the nature of an order to ſtay waſte) to prevent a breach of contract where no

treſpaſs

treſpaſs is committed. *Mich.* 39 *G.* 3. *Longman, Broderip and others* v. *Calliford.* 3 *Anſtr.* 645. Nor to prevent a tenant's ſelling dung off the farm, contrary to the covenants in a leaſe. 3 *Anſtr.* 749. *June* 36 *G.* 3. *Johnſon* v. *Goldſwain and others.* Sed vide *Geaſt* v. *Lord Belfaſt, ibid. in notis, contra.*

35. Injunction granted to prevent the negociating a note obtained at play, upon affidavit, before ſervice of the *ſubpœna.* 3 *Anſtr.* 851. *Hil.* 37 *G.* 3. —— v. *Blackwood and others.*

14 Vin 426. (A. 3) Grantable; in what Caſes to quiet Poſſeſſion.

1. AN injunction was awarded to reſtore and quiet the plaintiff and his tenants in the poſſeſſion of the premiſes in queſtion; but it was at the ſame time ordered that he ſhould appear to an ejectment to be brought by the defendant, in order to try the title. An ejectment was accordingly brought, and the defendant obtained a verdict, and was afterwards put into poſſeſſion; but on appeal it was ordered, that he ſhould be at liberty to bring an ejectment to recover poſſeſſion of the premiſes, and that no mortgage ſhould be ſet up in bar to the title. 3 *Bro. Par. Caſ.* 276. 1726. *Seagrave* v. *Ryan.*

2. It is uſual in *Ireland*, for a leſſee who has been in poſſeſſion three years, and is diſturbed, to file his bill in the Court of Chancery there, for an injunction to quiet him in poſſeſſion, till evicted by due courſe of law; and this uſage is founded upon the equity of the ſtatutes againſt forcible entries; but all bills of this kind muſt allege, and it muſt alſo be proved, that the ſole and actual poſſeſſion is in the plaintiff, and that no ownerſhip or poſſeſſion is in any other perſon. 4 *Bro. Par. Caſ.* 128. 1733. *Vernon* v. *Mayor, &c. of Dublin.*

3. Where there is a grant of a new invention by patent, a ſmall variation of the invention will not entitle another to break in upon the patent; and in the caſe of the grant of the ſole printing of a book to the author, who takes whole paragraphs from another book, it is not material; for it may be neceſſary to introduce what is new. 3 *P. Wms.* 255. *Eaſt.* 1734. *Gibbs* v. *Cole.*

4. Where a man ſuffers another to build upon his land, without ſetting up a title till afterwards, the Court of Chancery will oblige him to permit ſuch perſon quietly to enjoy. 2 *Atk.* 83. *Nov.* 1740. *Eaſt India Company* v. *Vincent.*

5. On application for an injunction, it was determined, that the *act* 8 *G.* 2. for the encouragement of the arts of deſigning, engraving, *&c.* is not confined to works of invention only, but means the deſigning or engraving any thing already in nature; a print publiſhed of any building, houſe, or garden, is within the act. And the property of prints veſts abſolutely in the engraver, though the day of publication be not mentioned; but the property in books does not veſt, without being firſt entered at Stationers'-hall. 2 *Atk.* 93. *Dec.* 1740. *Blackwell* v. *Harper.*

6. The

6. The ſtatute 8 *Ann. c.* 19., for veſting the copies of books in authors, is not a monopoly, but ought to receive the moſt liberal conſtruction. Books colourably ſhortened, are within the act; but an abridgment fairly made is a new book, becauſe the judgment of the author is ſhewn in it. The object of this ſuit was an injunction to ſtay printing a book, upon the ſuggeſtion that it was borrowed *verbatim* from another work. The court would not ſend it to law, becauſe it would be abſurd for a judge to ſit to hear both books read, but ſaid the parties ſhould fix upon two perſons learned in the law to read the books, and report their opinion. 2 *Atk.* 141. *March* 1740. *Gyles* v. *Wilcox.*

7. Defendant, on the coming in of his anſwer, moved to diſſolve an injunction againſt his vending a book of letters from *Swift*, *Pope*, and others: held that a collection of letters, as well as other books, is within the act of *Ann.* And the injunction was continued as to the letters written by Mr. *Pope.* 2 *Atk.* 342. *June* 1741. *Pope* v. *Curl.*—*The receiver of a letter has a joint property with the writer, and the poſſeſſion does not give him a right to publiſh it.*—*The reprinting a book in* ENGLAND, *pirated and printed in* IRELAND, *is an evaſion of the act.* S. C.

8. The plaintiff moved for an injunction to prevent the defendant's uſing the *Mogul* ſtamp on his cards, ſuggeſting the ſole right to be in the plaintiff, having appropriated the ſtamp to himſelf, conformably to the charter granted to the card-makers' company by King *Charles* the Firſt; but the court refuſed the injunction, being of opinion that there was no inſtance of reſtraining a trader from making uſe of the ſame mark with another. 2 *Atk.* 484. *Dec.* 1742. *Blanchard* v. *Hill.*

9. Leſſor grants a building leaſe for ſixty-one years, of a houſe in *Lincoln's-Inn Fields*, to *W.*, who aſſigns over the leaſe to the plaintiff for the remainder of the term; plaintiff rebuilds the houſe, and lays out 5000*l.* for that purpoſe, and pays the rent reſerved, *viz.* 40*l.* to the leſſor, till his death. On the death of the leſſor the defendant became entitled, as firſt remainder-man in tail; for ſix years he received the rent, and then brought an ejectment, and recovered at law for want of the uſual covenants in the building leaſe. Plaintiff brought his bill for an injunction, and to be quieted in the poſſeſſion of the houſe. The court directed a new leaſe to be executed with proper covenants, and the plaintiff to hold the premiſes for the remainder of the term. 3 *Atk.* 692. *March* 1748. *Stiles* v. *Cowper.*

10. The ſtat. 8 *G.* 2. *c.* 13., relative to prints, protects only the maker and deſigner. *Amb.* 164. *March* 1753. *Jeffery* v. *Baldwin.*

11. An abſtract of a book, publiſhed in a magazine, held not to be piracy; eſpecially as the author had publiſhed extracts of it in another paper. *Amb.* 403. *March* 1761. *Dodſley* v. *Minnerſley.*

12. The author of a farce permitted it to be performed, for which he received a premium, but never publiſhed it; it was taken down in ſhort hand during the performance. Injunction granted

granted to reſtrain the printing and publiſhing it. *Amb.* 694. *Dec.* 1770. *Maclin* v. *Richardſon.*

13. Injunction granted to reſtrain the printing and publiſhing private letters, without the conſent of the executors of the perſon who wrote them. *Amb.* 737. *March* 1774. *Thompſon* v. *Stanhope.*

14. An injunction will be awarded againſt the ſale of a book piratically taken from another, but not againſt a fair abridgment. 1 *Bro. Ch. Rep.* 451. *Trin.* 1785. *Bell* v. *Walker.*

15. *A.*, having ſold to a bookſeller a book of roads, which was printed in letter-preſs, after the expiration of the firſt 14 years ſold it to another, who publiſhed the high roads upon copper-plates, and the croſs roads in letter-preſs; as to the laſt, an injunction was granted. 2 *Bro. Ch. Rep.* 80. *Trin.* 1786. *Carnan* v. *Bowles.*

16. Injunction that the validity of a patent might be tried at law; verdict for the patentee, ſubject to the opinion of the court upon a caſe: the court were equally divided; the patentee muſt bring another action: but the court would not impoſe any terms upon him, nor diſſolve the injunction in the mean time. 3 *Veſ. jun.* 140. *June* 1796. *Bolton* v. *Bull.*

17. The plaintiff publiſhed a book of roads of *Great Britain*, compriſing *Patterſon's Book*, to the copyright of which the plaintiff was not entitled, with improvements and additions obtained by actual ſurvey and otherwiſe. An injunction to reſtrain the publication of an edition of *Patterſon's Book*, compriſing the plaintiff's improvements and additions, was refuſed. 3 *Veſ. jun.* 20. *Nov.* 1799. *Cary* v. *Faden.*

18. Injunction againſt a colourable abridgement of the Term Reports *B. R.* among other law reports, till anſwer or further order, upon certificate of the bill filed. 5 *Veſ. jun.* 709. *January* 1800. *Butterworth* v. *Robinſon.*

14 Vin. 427.

(A. 4) Grantable; in what Caſes *in general.*

1. SIR *Conſtantine Phipps* moved for an injunction, becauſe the defendant had only demurred to the bill without pleading or anſwering, which he alleged was only in delay. The court refuſed to grant an injunction, but ordered the demurrer to be ſet down to be argued on a ſhort day. *Bunb.* 11. 1717. *Lamb* v. *Bowes.*

2. Upon an extent an inquiſition was taken, which found a term of ſo much value; the defendant pleaded to the inquiſition, and it was found for the crown; and it was inſiſted for the defendant that the court ſhould order a *venditioni exponas*, but an injunction was awarded to put the crown into poſſeſſion. *Bunb.* 71. 1720. *Rex* v. *Rawlins.*

3. An injunction, to quiet the plaintiff in his poſſeſſion, may be moved for before ſervice of the ſubpœna to anſwer. *Bunb.* 110. 1722. *Pearce* v. *Penroſe and others.*

4. Notice

4. Notice of filing exceptions must be two days before you can move for an injunction. *Bunb.* 116. 1722. *Lord Carliſle* v. *Wymondſel and others.*

5. Upon an order for time, the plaintiffs immediately moved according to the prayer of the information, which was to enjoin defendants from miſapplying money, which was received for the benefit of a corporation, and this, though ſevere, was granted. *Bunb.* 258. *Attorney-General* v. *Norris.*

6. Defendant was outlawed; plaintiff obtained a leaſe from the crown, and moved for an injunction to put him in poſſeſſion, which was refuſed. *Bunb.* 261. 1728. *Tiffin* v. *Jackſon.*

7. It was moved that an injunction *on an attachment* ſhould extend to ſtay defendants receiving *S. Sea* annuities, which was granted, being according to the prayer of the bill, and the anſwer not being come in. *Bunb.* 289. 1730. *Terry* v. *Harriſon.*

8. A wife, executrix, was reſtrained from getting in the aſſets of her teſtator, her huſband being in the *Weſt Indies*, and out of the juriſdiction of the court. 2 *Atk.* 213. *Oct.* 1741. *Taylor* v. *Allen.*

9. *B.* (the plaintiff) was reſiduary legatee and ſurviving executrix of her huſband, to whom *C.* and *O.* had given a joint bond. *C.* died, and the plaintiff was indebted, on her own private account, to *O.*, who is a bankrupt. The bill was brought againſt his aſſignees for an injunction, and to ſet off what was due to her as executrix againſt the debt due from her to the bankrupt; but the injunction was refuſed, the debts being due in different rights, and are not comprehended in the ſtat. 2 *G.* 2. 3 *Atk.* 691. *Dec.* 1748. *Biſhop* v. *Church.*

10. The defendant was in this caſe reſtrained from negociating a promiſſory note, given on a marriage-brokage agreement, till anſwer or further order. *Amb.* 66. *Oct.* 1747. *Sir Edward Smith* v. *Haytwell.*

11. As to the iſſuing of commiſſions to examine witneſſes abroad, and the granting injunctions in the mean time, ſee *Bro. Par. Caſ.* 7 vol. 192. *Cojamaul and others* v. *Vereliſt*; and 245., *Nicol* v. *Vereliſt.* 1774.

12. Injunction againſt a purchaſer on behalf of a creditor, to reſtrain payment of the purchaſe-money to the heir. 3 *Bro. Ch. Rep.* 217. *Hil.* 1791. *Green* v. *Jones.*

13. An injunction is granted on amended bill on ſpecial motion, without affidavit, after injunction diſſolved on the original bill. 3 *Bro. Ch. Rep.* 425. 1792. *Edwards* v. *Jenkins.*

14. Injunction to reſtrain defendant from negociating a bill of exchange, given for goods not delivered. Iſſued on certificate of bill filed and affidavit. 3 *Bro. Ch. Rep.* 476. *March* 1792. *Patrick* v. *Harriſon.*

15. Motion granted for an injunction and receiver, for one partner againſt another, the defendant being in contempt, and being ſerved perſonally, and not appearing. 4 *Bro. Ch. Rep.* 441. 1793. *Mead* v. *Bowers.*

16. Injunction

16. Injunction granted againſt ſecurities obtained by one *French* emigrant againſt another by arreſting him; he was about to ſail on an expedition againſt *France*, and under an obligation entered into in *France* as ſurety, which, according to the laws of *France*, could not affect the perſon. 3 *Veſ. jun.* 447. *June* 1797. *Talleyrand* v. *Boulanger*.

17. Injunction to reſtrain a breach of covenant, ſecured by forfeiture of leaſe and a penalty. 5 *Veſ. jun.* 555. *Aug.* 1800. *Barret* v. *Blagrave*.

18. After an injunction diſſolved on the merits, the plaintiff cannot, on an amended bill, have another injunction, without a ſpecial affidavit of merits, though the defendant be in contempt for not anſwering. 1 *Anſtr.* 188. *Eaſt.* 33 *G.* 3. *Lingham* v. *Toule*.

14 Vin. 428.

(A. 5) At what *Time* it may be granted.

1. AFTER a plea put in, there can be no motion for an injunction till the plea is argued. 3 *P. Wms.* 396. *Mich.* 1733. *Humphreys* v. *Humphreys*.

2. A plea muſt firſt be removed out of the way, before the plaintiff can have an injunction to ſtay proceedings at law. 2 *Atk.* 113. *Jan.* 1740. *Anon.*

14 Vin. 429.

(B) *How*, and *on what Suggeſtions* and *Terms granted* or *obtained*.

1. INJUNCTION granted on behalf of a patentee of a new invention, after the anſwer came in, on affidavit of the prejudice which would ariſe from diſſolving it. 3 *P. Wms.* 255. *Eaſt.* 1734. *Gibbs* v. *Cole*.

2. After a writ of execution of a decree, and an attachment ſerved on the defendant, the plaintiff may have an injunction to the defendant to deliver poſſeſſion, and next a writ of aſſiſtance, commanding him to be aiding in putting the defendant into poſſeſſion. 3 *Atk.* 275. *Nov.* 1744. *Stribley* v. *Hawkie*. See alſo 1 *Bro. Ch. Rep.* 376.

3. A plaintiff, where an injunction has been diſſolved on the merits or for want of ſhewing cauſe, cannot, by amending his bill and defendants obtaining a *dedimus* to take his anſwer, move for an injunction, but on the coming in of the anſwer, he may move for an injunction on the merits. 3 *Atk.* 694. *May* 1749. *Anon.*

4. A proper writ of injunction cannot be granted unleſs prayed by the bill. *Amb.* 70. *January* 1749. *Javory* v. *Dyer*.

5. Injunction diſſolved on the merits; plaintiff amends his bill, or brings a ſupplemental bill for the ſame matter; he cannot have an injunction till anſwer. *Amb.* 104. *October* 1750. *Travers* v. *Lord Stafford*. 2 *Veſ.* 19. S. C.

6. Where a bill is referred for impertinence before the time for anſwering is out, the plaintiff cannot have an injunction of courſe, for

for want of an anſwer; but muſt move it on notice and affidavit. 1 *Bro. Ch. Rep.* 574. *June* 1784. *Neale* v. *Wadeſon.*

7. Motion for an injunction to reſtrain Lord *Byron* from preventing the water flowing to plaintiff's mill in ſuch regular quantities as it had ordinarily done the 4th of *April* 1785. The motion was before appearance, and upon affidavits ſtating Lord *Byron*'s object, from expreſſions, to exact money from the plaintiff, the motion was granted; but afterwards, upon motion to diſſolve the injunction, upon coming in of the anſwer, the Maſter of the Rolls refuſed to let the affidavits be read. 1 *Bro. Ch. Rep.* 589. *May* 1785. *Robinſon* v. *Lord Byron.* See 2 *Bro.* 90. *Strathmore* v. *Bowes.*

8. Injunction granted in preſſing caſes, on *petition and affidavit.* In the particular caſe, on converting old houſes in *London* to a purpoſe dangerous to the public, the Lord Chancellor granted the injunction. 5 *Veſ. jun.* 129. *Mayor of London* v. *Bolt.*

9. On a bill for diſcovery and injunction, the defendant (plaintiff at law) admitted himſelf to be a mere agent for the other defendant, and ignorant of the tranſaction; an injunction was moved for as of courſe, till the coming in of the anſwer of the other defendants, who lived abroad; but there appearing a danger of loſing other material evidence by the delay, it was refuſed. 2 *Anſtr.* 502. *Mich.* 35 *G.* 3. *Vandam* v. *Munro.*

10. On a truſt to ſell, a ſuggeſtion in the bill of improper conduct of the truſtees, in not giving ſufficient notice of the ſale, is not a ground for an injunction to ſtop the intended ſale. 2 *Anſtr.* 549. *Eaſt.* 35 *G.* 3. *Sir John Pechel, Bart.* v. *Fowler and others.*

(C) *To what Court or Place, &c.* Injunction lies. 14 Vin. 431.

1. AN injunction was granted to ſtay proceedings in the Biſhop of *Ely*'s court, until anſwer, where the defendant, as rector of *Gambigla* in *Cambridgeſhire*, libelled againſt the plaintiffs, his pariſhioners, for tithes; and upon alleging ſeveral moduſes, the proof of which aroſe out of the anſwer, the motion was granted. *Bunb.* 27. 1718. *Abthorp and others* v. *Jennings.*

2. An injunction was alſo granted to ſtay proceedings in the ſpiritual court in *Yorkſhire*. *Attorney-General* v. *Starkey.* 1722. *In notis.* See alſo *Sir Edward Blacket* v. *Dr. Finney*, *Bunb.* 176. 1724. And *Salmon and others* v. *Rake.* 1733. *In notis.*

3. Where there is a truſt, or any thing in the nature of a truſt, notwithſtanding the eccleſiaſtical court hath an original juriſdiction in legacies, yet equity will grant an injunction. And where the huſband of an infant inſtitutes a ſuit in the eccleſiaſtical court for her legacy, upon the executors filing a bill, and ſuggeſting this matter to the court, an injunction would be continued to the hearing. 1 *Atk.* 491. *Feb.* 1738. *Anon.*

4. An injunction does not deny, but admits the juriſdiction of the court of common law; the ground on which it iſſues is, that the court of law exerciſes a juriſdiction contrary to equity: as where a truſtee is ſuing in the eccleſiaſtical court for payment of *ceſtui que truſt*'s legacy, or where a huſband is ſuing for a portion before ſettlement made. 1 *Atk.* 516. *December* 1737. *Hill* v. *Turner.*

5. A legacy of 800*l.* deviſed to *E. B.*, payable at 21 or marriage, charged on a fund partly real and partly perſonal; *ſhe died before* 21 *unmarried: aſſets were admitted,* the court would not grant an injunction to ſtay proceedings in the eccleſiaſtical court for the recovery of the legacy. 3 *Atk.* 203. *December* 1744. *Baſſet* v. *Baſſet.*

6. The owners of two privateers ſeized upon the ſhip *Diligence* as lawful prize, it appearing by the captain's papers that ſhe had carried proviſions to the enemy; and the captain ſigned a note, by which he acknowledged that they had very juſtly confiſcated the cargo. The captain of the *Diligence* brings a bill in chancery for an injunction to the court of admiralty to ſtay a ſuit pending there on the lawfulneſs of the tranſaction, ſuggeſting that ſome of the papers are loſt, and that, if the note, which he was obliged to give, ſhould be produced, he muſt be caſt at law. The injunction was refuſed; for if it were to be granted upon ſuch pretences, it would defeat the act of parliament relating to prizes; and if the ſigning of the note were owing to dureſs, the court of admiralty could ſuppreſs it. 3 *Atk.* 350. *June* 1746. *Anon.*

7. A ſuit in the eccleſiaſtical court for ſubtraction of tithes; the defendant there brings a bill to eſtabliſh a *modus*, and on the bare ſuggeſtion of a *modus* brings a bill for an injunction to ſtay proceedings in the eccleſiaſtical court; but the injunction was denied. 3 *Atk.* 628. *March* 1748. *Rotherham* v. *Fanſhaw.*

8. Where a ſuit is inſtituted in the ſpiritual court for an infant's legacy, by a father, to have it paid into his hands, the court of chancery granted an injunction. *Ibid.* 69.

24 Vin. 431.

(D) *Perpetual* Injunctions. In what Caſes.

1. PERPETUAL injunction after five ejectments and two bills in equity. *Bunb.* 158. 1723. *Barefoot* v. *Fay.*

2. Bill for a perpetual injunction to ſtay proceedings in the prerogative court, by the Ducheſs of *Buckinghamſhire*, for controverting the will of the Duke of *Buckinghamſhire*, which had been proved in this court, and admitted by the ducheſs in her anſwer. Injunction made perpetual. 1 *Atk.* 628. *October* 1739. *Sheffield* v. *Ducheſs of Buckinghamſhire.*

(E) The *Force* of an Injunction. 14 Vin. 431.

1. IT is no excuſe for proceeding at law after an injunction is granted, that it is not ſealed; for where a defendant or his attorney have been preſent on an order for an injunction being made, and they have proceeded at law before it has been ſealed, the court has conſidered it as a contempt, and committed them for it. 3 *Atk.* 567. *Mich.* 1747. *Anon.*

2. Where an injunction is obtained till the coming in of the anſwer of one defendant, who reſides abroad, the plaintiff is not compellable to bring the money into court, unleſs on ſpecial circumſtances. 2 *Anſtr.* 366. *Mich.* 34 *G.* 3. *Shoulbred* v. *Macmaſter and others.*

3. Where an injunction ſubſiſts, the court will not grant a commiſſion to examine a witneſs in *India*, without a ſpecial affidavit of materiality. 2 *Anſtr.* 386. *Hil.* 34 *G.* 3. *Moody* v. *Steele.*

(F) Diſſolved, or made abſolute, in what Caſes, and how. 14 Vin. 433.

1. UPON exceptions being over-ruled, the injunction is diſſolved without motion. *Bunb.* 30. 1718. *Walter* v. *Ruſſel.*

2. *Simmons* filed his bill to be relieved againſt an award (under the ſtat. 9 & 10 *W.* 3. and for the non-performance of which an attachment had iſſued), ſuggeſting fraud in the arbitrators, and obtained an injunction, exceptions being allowed, defendant had liberty to proceed at law notwithſtanding the injunction. *Bunb.* 182. 1724. *Simmons* v. *Mullins.*

3. If defendant does not ſign his anſwer, the injunction will be continued; *ſed quære*, if plaintiff takes a copy of the anſwer, it is not a waiver of the informality. *Bunb.* 251. 1728. *Anon.*

4. Injunction continued on behalf of the patentee of a new invention after the anſwer came in, on affidavit of the prejudice which would ariſe on diſſolving it. 3 *P. Wms.* 255. *Eaſt.* 1734. *Gibbs* v. *Cole.*

5. A point which materially concerns the merchants will induce the court to continue an injunction till the hearing. 2 *Atk.* 229. *Mich.* 1741. *Green* v. *Suaſſo.*

6. Where there was an action brought for money had and received, as attorney for the plaintiff, and the defendant files a bill, in which he admits to have received the money, ſtates that he placed it in the hands of a banker, who had become bankrupt, and had paid two dividends, and prays an injunction, which was obtained for want of an anſwer; the court ordered the plaintiff in equity to bring the amount of the two dividends into court, or

the injunction to be diſſolved. 1 *Bro. Ch. Rep.* 452. 1785. *Sherwood* v. *White.* Vide alſo *Acton* v. *Market*, 2 *Bro. Ch. Rep.* 14.; and *Culley* v. *Hickling*, *ibid.* 182.; *but it muſt be on affidavit.* See alſo *Weſt* v. *Carnevall*, *Coghlan* v. *Requeneau*, *Potts* v. *Butter*, and *Mitchel* v. *Davis*, *in notis.* S. P.

7. Affidavits filed to obtain an injunction to ſtay waſte before anſwer, not allowed to be read upon motion to diſſolve the injunction upon the coming in of the anſwer. 1 *Bro. Ch. Rep.* 589. *May* 1785. *Robinſon* v. *Lord Byron.* See alſo *Strathmore* v. *Bowes*, 2 *Bro. Ch. Rep.* 90. S. P.

8. Injunction that the validity of a patent might be tried at law; verdict for the patentee, ſubject to the opinion of the court upon a caſe; the court were equally divided; the patentee muſt bring another action; but the court will not interpoſe any terms upon him, nor diſſolve the injunction in the mean time. 3 *Veſ. jun.* 140. *June* 1796. *Bolton* v. *Bull.*

9. On an injunction obtained, the court will not diſcharge the plaintiff out of cuſtody, if taken on legal proceſs; but where a party is taken after he has obtained an injunction, but before notice given of it, the detaining him after notice is no contempt. 1 *Anſtr.* 36. *May* 32 *G.* 3. *Willis* v. *Daniel.*

10. A conditional conſent to proceed at law waives an injunction. 1 *Anſtr.* 62. *Trin.* 32 *G.* 3. *Grant* v. *Priddell.*

11. On exceptions over-ruled, the plaintiff cannot move to diſſolve an injunction, unleſs he has obtained a prevous order *niſi* for that purpoſe. 1 *Anſtr.* 255. *Trin.* 33 *G.* 3. *Dubarry, in Scaccario, otherwiſe in Chancery.*

12. On a commiſſion to examine witneſſes in *India* not being returned in two years, the court will diſſolve the injunction. 1 *Anſtr.* 276. *July* 33 *G.* 3. *Penny* v. *Edgar.*

13. After an injunction on the original bill diſſolved on the coming in of the anſwer, the plaintiff cannot have an injunction on the ſupplemental bill, though ſupported by affidavits, unleſs the defendant is in contempt. 2 *Anſtr.* 555. *Eaſt.* 35 *G.* 3. *Gadd* v. *Worral.*

14. After an injunction obtained, a demurrer to the prayer for injunction is allowed: yet the injunction cannot be diſſolved without the previous order. 2 *Anſtr.* 585. *Trin.* 35 *G.* 3. *Hurſt* v. *Thomas.*

15. Where an anſwer is referred for impertinence, it is good ground for continuing the injunction. *Ibid.* 591.

16. Where an injunction is obtained for want of an anſwer, and an anſwer afterwards filed, but the defendant does not move to diſſolve the injunction till two terms afterwards, and when the bill has been amended, yet the injunction may be diſſolved by motion of courſe. 3 *Anſtr.* 651. *Mich.* 36 *G.* 3. *Patton* v. *Panton.*

17. Where an injunction is obtained on the abſence of one of the defendants abroad, on a motion to diſcharge that order, the anſwer of the other defendant cannot be read. 3 *Anſtr.* 935. *Trin.* 37 *G.* 3. *St. John* v. *Cargill and others.*

(G) Of the Service of an Injunction.

14 Vin. 416.

UPON an injunction bill to ſtay proceedings at law, the defendant living abroad, a motion that ſervice of the *ſubpœna* upon the attorney may be good ſervice, requires an affidavit of merits. 4 *Veſ. jun.* 359. *Dec.* 1798. *Stephens* v. *Cine.*

Inns and Innkeepers.

[D]
14 Vin. 436.

1. THE defendant pleaded (to trover) that he was an innkeeper; that the plaintiff owed him for the keep of his horſe at different times more than its value, and therefore he detained and ſold it: held bad; for though he might detain he could not ſell, except in *London*, by the cuſtom; and he could only detain for what he had then ſold to him; not for a former demand. *Jones* v. *Pearle*, 1 *Stra.* 556.

2. The landlord of livery ſtables, diſtrained for rent the coach of a ſtranger, ſtanding at livery in the coach-houſe there; and after argument, in which it was inſiſted to be like cloth at a tailor's, or the horſe of a gueſt at an inn, and ſo protected, the avowant had judgment. *Francis* v. *Wyatt*, 3 *Burr.* 1498.

(A) Innuendo.

[G]
14 Vin. 442.

1. AN innuendo can only explain or apply precedent matter; it cannot add to or extend it. *Rex* v. *Griepe*, 1 *Lord Raym.* 256.

2. *You are guilty* (*innuendo* of the murder of *D. D.*) held after verdict a ſufficient charge of *murder*, though the *colloquium* were only of the death. *Peake* v. *Oldham*, *in error*, 1 *Cowp.* 276. And *vide* 2 *Cowp* 685.

3. The complaint of the defendant being that he was arreſted in returning home after the hearing of a cauſe, before he got to his own houſe in the pariſh of *St. Martin in the Field*, *innuendo* his houſe *in the Haymarket in St. Martin's*, *&c.* The *innuendo* is only a more particular deſcription of the ſame houſe, and good. *Rex* v. *Aylett*, 1 *T. R.* 69.

4. The oath being that the defendant was arrested upon the steps of his own door, an *innuendo* that it was the *outer* door is good. *Ibid.*

5. An action of slander upon several sets of words; verdict for the plaintiff upon the first and fifth sets of words, damages 40*l.* The first set were these, *That rogue John Tindall* (meaning the plaintiff) *that set the house on fire* (meaning the summer-house that was burnt in the occupation of one Mr. *Cotton*), *and if any body will give me charge of him I will carry him to New Prison.* The fifth set of words were, *John Tindall* (meaning the plaintiff) set the house on fire (meaning the same house). It was moved in arrest of judgment, that the latter set of words were not actionable, for that every count in a declaration is a substantive count, and the *innuendo* (meaning the same house) shall not relate to the summer-house in the first set of words. *Per curiam.* Although the latter set of words be not of themselves actionable, yet they shall have relation to the former set, and we must take them to have been spoken *maliciously*, as the jury have found for the plaintiff. *Tindall* v. *Moore.* *C. B.* 2 *Wilson*, 114.

[G]

Inquiry.

7 Vin. 305.

(B. a) Writ of Inquiry of Damages: in what Cases awarded; and how it may be.

1. A WRIT of inquiry of damages is a mere inquest of office to inform the conscience of the court; who, if they please, may themselves assess the damages. And it is accordingly the practice in actions upon promissory notes and bills of exchange to refer it to the Master to see what is due for principal and interest without executing a writ of inquiry; for the quantum of damages depending on figures may as well be ascertained before the Master as a jury. *Shepherd* v. *Carter*, 4 *T. R.* 275. *Dupuy and Johnson*, 7 *T. R.* 473. See also 1 *H. Bl.* 252. 529. 541. *acc.*

2. This practice, however, is confined to actions upon promissory notes and bills of exchange, and therefore where the defendant had suffered judgment by default in an action of *assumpsit* on a foreign judgment, the court refused to refer it to the Master to see what was due, and give leave to enter up final judgment, without executing a writ of inquiry; saying this was an attempt to carry the rule further than had yet been done, and as there was no instance of the kind, they would not make a precedent for it. *Messin* v. *Lord Massareene and Wife*, 4 *Term Rep.* 493.

3. The

3. The court alſo refuſed the application, in an action upon a bill of exchange, for 200*l.* *Iriſh* money, for a jury are the proper judges of the value of this money. *Maunſel* v. *Lord Maſſareene*, 5 *T. R.* 87.

4. Where the firſt count in a declaration was on a bill of exchange, to which count there was a demurrer and judgment for the plaintiff, though there was a plea to the other counts on which iſſue was joined, the court of king's bench referred it to the Maſter to ſee what was due on the firſt count. *Depersy* v. *Johnſon*. *H.* 38 *G.* 3. 7 *T. R.* 473. *Vide* further, *Nelſon* v. *Sheridan*, 8 *T. R.* 395. *Oſborn* v. *Noad*, *Ibid.* 648. *Berthen* v. *Street*, *Ibid.* 326. *Byrom* v. *Johnſon*, *Ibid.* 410.

5. In an action againſt an overſeer of the poor, if there is a verdict for him and no damages aſſeſſed, a writ of inquiry ſhall iſſue. *Valentine* v. *Fawcett*. *T.* 8 *G.* 2. 2 *Stra.* 1021.

6. The want of a writ of inquiry is aided by the ſtatute of jeofails; though it was inſiſted to be ſuch a fault as cannot happen in the caſe of a verdict. *Mallory* v. *Jennings*. *M.* 4 *G.* 2. 2 *Stra.* 878. *Iles* v. *Pitt*, 2 *Lord Raym.* 1397. S. P.

7. After judgment by default in an action of debt on a judgment, the plaintiff may ſue out a writ of inquiry. *Blackmore* v. *Fleming*. *M.* 38 *G.* 3. 7 *Term Rep.* 446.

(D. a) Inquiry of. Writ quaſhed or ſuperſeded; for what, and when. And Notice; in what Caſes; when; and how.

7 Vin. 310.

1. UPON executing the inquiry, the plaintiff was ſurpriſed with a defence, and not prepared to prove his whole demand; and the court ſet it aſide on payment of coſts, the damages being too ſmall. *Hall* v. *Stone*. *E.* 8 *G.* 1. 1 *Stra.* 515. *Markham* v. *Middleton*, 2 *Ibid.* S. S.

2. But the court will not ſet it aſide in an action *for a tort*, on the ground of ſmallneſs of damages. An action was brought for theſe words ſpoken of the plaintiff as a wine-merchant. "You "are a rogue, villain, and raſcal, and ſell by ſhort meaſure;" and the jury gave twenty ſhillings damages. And though it was thought a hard caſe, yet the court ſaid it has always been denied to ſet aſide a verdict for ſmallneſs of damages, and therefore denied it. *Quære tamen*, why is it not within the reaſon for ſetting aſide a verdict for exceſſive damages. *Hayward* v. *Newton*, 2 *Stra.* 940. And *vide Burges* v. *Nightingal*, *Barnes' Notes*, 230.

3. But where the ſmallneſs of damages ariſes from a miſtake in the law, either in the judge, or in the jury, the court will ſet it aſide. On a contract for ſtock between the plaintiff and *J. S.*, they each depoſit 200*l.* in the hands of the defendant, and *J. S.*, not performing his agreement, the plaintiff ſues for the depoſit, and had judgment on demurrer, and took out a writ of inquiry and proved his caſe; but the jury, on a notion that the defend-

ant could not pay out the money without consent of both parties, gave one penny damages; which was now set aside, the court saying, that the rule of not setting aside verdicts for the smallness of the damages did not extend to this case, where the jury mistook in point of law: and the Chief Justice said he knew no reason why the court should not interpose in the other case. *Woodford* v. *Eades*. 1 *Stra*. 425.

4. The plaintiff, after the interlocutory judgment and awarding the writ of inquiry, became a bankrupt, and afterwards the inquiry is executed in his name; it was moved to set this aside, on the ground that by the bankruptcy the property vested in the assignees, who should have sued out a *scire facias*, and the writ of inquiry have been executed in their names. But the court discharged the rule. *Bibbins* v. *Mantel*, 1 *Wilf*. 358.

5. Judgment on a writ of inquiry was set aside; it appearing that the under-sheriff, who had returned the jury, was attorney for the plaintiff in the action. *Baylis* v. *Lucas*, 1 *Coup*. 112.

6. Where part of the jury on a writ of inquiry was composed of persons then in prison for debt, it was held a sufficient reason to set aside the execution of a writ of inquiry. *Stainton* v. *Beadle*, 4 *T. R*. 472.

7. The interlocutory judgment was signed in *Trinity* term 1737, and in *Auguſt* 1738 a writ of inquiry was executed upon eight days' notice; which was set aside as irregular, and held that where a term's notice of trial is required, there must at the same distance of time be the like notice of executing a writ of inquiry. *Peyton* v. *Burdus*, 2 *Stra*. 1190.

8. And a term's notice must be given in all cases where the proceedings have been delayed, except by *injunction* out of Chancery, for four terms. *Rule*, *Mich. Term*, 4 *Ann*.

9. On notice to execute a writ of inquiry at a certain hour, the party is not restricted to the exact time contained in the notice, for the sheriff may have prior business, which may last beyond the hour. 1 *Dougl*. 198.

10. If notice of inquiry to be executed at a particular hour and place be continued, the notice of continuance need not express any hour or place. *Jones* v. *Chune, one, &c*. *Ib*. 39 *G*. 3. 1 *Bos*. & *Pull*. 363.

11. The notice was to execute a writ of inquiry *by ten* o'clock, and there being no defence made, the court set it aside for uncertainty. *Iſon* v. *Fowen*, 2 *Stra*. 1142.

12. But notice to execute *at ten*, being certain, is good. *Laſt* v. *Denny*, *Barnes*, 302.

13. The usual way is to give notice that the inquiry will be executed *between* two certain hours of a particular day, on or before the return of the writ. *Arnold* v. *Squire*, *Sayer Rep*. 181.

14. There must be the same notice of executing a *scire fieri* inquiry, as a common inquiry. *Stead* v. *Latewood*, 1 *Stra*. 622.

15. The notice of inquiry, if the defendant have appeared and his attorney be known, should be delivered to such attorney. But if

if the defendant have not appeared, or his attorney be unknown, the notice ſhall be delivered to the defendant himſelf, or left at his laſt place of abode. *Sayer Rep.* 133.

16. Where the plaintiff, upon any pleading of the defendant, tenders an iſſue, and the paper-book is made up and delivered, with notice of trial, and the defendant ſtrikes out the *ſimiliter* and returns the book with a demurrer, if judgment be given thereon for the plaintiff, the defendant's attorney ſhall be obliged to accept of notice of executing the writ from the time of giving the notice of trial. *R. H.* 8 *G.* 1.

(E. a) Writ of Inquiry. Executed. At what Time or Place, and what muſt be proved then. 7 Vin. 314.

1. IN an action on a policy on a foreign ſhip, where there is a ſtipulation that the policy ſhall be ſufficient proof of intereſt, if there is judgment by default, the plaintiff on the writ of inquiry needs only to prove the defendant's ſubſcription to the policy, without giving any evidence of intereſt. *Thelluſon* v. *Fletcher*, 1 *Dougl.* 314.

2. If a writ of inquiry iſſues upon confeſſion of the action, in treſpaſs for taking goods, the plaintiff need not prove the property of the goods, but only the value. 2 *Dougl.* 510.

3. In an action on an agreement for goods at a ſale, and judgment by default, the defendant ſhall not, on a writ of inquiry, be allowed to go into evidence of fraud on the ſale; for by ſuffering judgment to go by default, he admits the agreement as ſet out by the plaintiff, and the writ of inquiry is only to ſettle the *quantum* of damages. *Eaſt India Company* v. *Glover*, 1 *Stra.* 612.

4. Execution of a writ of inquiry may be adjourned after it is entered upon. *Coleman* v. *Mawbey*, 2 *Stra.* 853.

5. Writ of inquiry may be executed, on due notice, before the ſheriff, or his deputy. 2 *Wilſ.* 379. Or by leave of the court, under ſpecial circumſtances, before the Chief Juſtice. 1 *Stra.* 612.

6. But unleſs ſome matter of law is likely to ariſe in the courſe of the inquiry, the court will not give leave to have it executed before a judge merely on account of the importance of the facts. *Boddington* v. *Boddington*, *E.* 37 *G.* 3. But *vide* 2 *Sel.* 12.

[G]

Inrolment.

14 Vin. 446.

(G) Pleadings,

1. BY ſtat. 10 *Ann. c.* 18. *ſ.* 3., and 8 *Geo.* 2. *c.* 6. *ſ.* 21., where an indenture of bargain and ſale inrolled is pleaded with a *profert in curia*, the party may ſhew forth a copy of the inrolment; and ſuch copy, examined with the inrolment and ſigned by the proper officer, and proved on oath to be a true copy, ſhall be of the ſame effect as the original.

2. On a proviſo in a duchy leaſe, that it ſhall be inrolled with the auditor, the certificate of the auditor on the margin is ſufficient evidence of the inrolment. *Kinnerſley* v. *Thorpe*, 1 *Dougl.* 56.

3. If a deed be inrolled and loſt, and the clerk of the aſſize makes out a copy of the inrolment only; this is no evidence without proving it examined; becauſe the clerk is entruſted to authenticate the deed itſelf by inrolment, and not to give out copies of the inrolment of that deed. *Gilb. Law of Evid.* p. 26, *Loffi*'s ed.

Vide tit. *Bargain and Sale*, &c.

[D]

14 Vin. 447.

Inſtant.

See *poſt*, tit. *Time*.

[F]

Intereſt.

14 Vin. 457.

(C) Intereſt *Money*. Allowable in what Caſes, other than Legacies, Mortgages, and Portions.

1. *A.* Being indebted to *B.* in 800*l.* on a ſtated account, entered into articles for the payment of this debt by inſtalments of 50*l. per ann. A.* afterwards, by deed, created a term of years for the payment of his debts, out of the rents and profits of the

the eſtate, but not by ſale or mortgage, only two of theſe inſtalments being paid, a bill was brought for recovering the reſt: and on a queſtion, Whether they carried intereſt? it was held they did. *B. P. Caſes*, 7 vol. 164. 1734. *Counteſs Kildare* v. *Hopſon.*

2. Though by deed 5*l. per cent.* was to be allowed, yet as it appeared that the money had been placed out on Government ſecurities, yielding 4*l. per cent.* only, the *Court* reduced the intereſt to that rate. 3 *P. Wms.* 228. *Mich.* 1733. *Lechmere* v. *Earl of Carliſle.*

3. In a poor cauſe, to ſave expence, and where the matter is clear, the court has referred it to the Regiſter, inſtead of a Maſter, to compute intereſt or arrears of rent. 3 *P. Wms.* 258. *Eaſt.* 1734. *Holder* v. *Chambury.*

4. Tenant for life pays one third of the intereſt on debts and legacies, the reverſioner two thirds. 1 *Atk.* 467. *Feb.* 1736. *Partridge* v. *Pawlet.*

5. A debtor left a creditor by note on demand, his executor: the court will not allow him intereſt for it, becauſe he may turn the money to his advantage, which is coming in from the aſſets. 2 *Atk.* 106. *Dec.* 1740. *Adams* v. *Gale.*

6. There is no certain rule as to giving intereſt upon arrears of an annuity; the moſt frequent inſtances are where the annuity was meant as bread for the wife or child. 2 *Atk.* 211. *July* 1741. *Drapers' Company* v. *Davis.*

7. Where an annuitant has entered, and is in poſſeſſion of the eſtate charged with the annuity, the court will not oblige him to quit the poſſeſſion, till the grantor allows him intereſt for the arrears of his annuity. 2 *Atk.* 411. *Oct.* 1742. *Sir John Robinſon* v. *Cumming.*

8. The court had decreed an account againſt the defendant of the aſſets of her huſband, as his adminiſtratrix: ſhe took all his goods and ſtock in trade, and carried on the ſame buſineſs: the Maſter reported 1400*l.* due to the plaintiffs upon the balance of accounts, and the court thought ſhe ſhould not be charged with intereſt on the ſum of 1400*l.*, as it was only a demand by ſimple contract, and ſhe had not then ſold the goods, her only fund for raiſing money. 2 *Atk.* 439. *Nov.* 1742. *Ryves* v. *Coleman.*

And though there be no expreſs reſervation of intereſt in the decree, yet there is a diſcretionary power to allow it on ſpecial circumſtances. Ibid.

9. If an executor places out aſſets which are ſpecifically deviſed, the court will oblige him to account for the intereſt he may have made of thoſe aſſets; but there never was a caſe where the Maſter was directed to charge intereſt upon an executor, who made uſe of aſſets come to his hands in the way of his trade. 2 *Atk.* 603. *June* 1743. *Sir Cæſar Child* v. *Gibſon.*

10. Bill for the arrear of an annuity of 30*l.* ſecured by bond in the penalty of 500*l.*: an account was decreed of the arrears due ſince the year 1741, and intereſt *at* 4*l. per cent.*, to be computed at the end of each half year. As this was given by way

of

of maintenance, and a bond to ſecure it, the plaintiff is clearly entitled to intereſt. 3 *Atk.* 579. *Nov.* 1747. *Newman* v. *Auling.*

It is not a general rule, that a purchaſer of eſtates under a private agreement or a decree for a ſale, ſhall pay intereſt, from the time of poſſeſſion; and the court, in awarding intereſt, never regards the execution of articles for a purchaſe, but the time of the execution of the conveyances; and even then the purchaſer ſhall pay intereſt only from the time the poſſeſſion was delivered. *Ibid.*

11. The advantage a purchaſer receives from the wearing out of lives is not a reaſon for his paying intereſt for the purchaſe-money; but where lives drop after a purchaſer is reported the beſt purchaſer, he has been directed to make a compenſation in reſpect of the eſtate being bettered. 3 *Atk.* 636. *April* 1748. *Blount* v. *Blount.*

12. A decree for the ſale of an eſtate in mortgage. The Maſter's report ſtated a certain ſum due to the mortgagee for principal and intereſt; the report was confirmed. The mortgage was at five *per cent.*; but as there was another mortgage and creditors beſides, from the time of the report confirmed, it was to carry 4*l. per cent.* intereſt only; *but this ſeems to have been done by conſent.* 3 *Atk.* 722. *Feb.* 1750. *Harris* v. *Harris.*

13. Where a contract is made in *England* for a mortgage of a plantation in the *Weſt Indies*, no more than legal intereſt ſhall be paid on ſuch mortgage. 3 *Atk.* 727. *March* 1750. *Stapleton* v. *Conway.* 1 *Veſ.* 427. S. C.

14. Where there is a debt by covenant in marriage articles, and no mention of intereſt, the court will not reduce it lower than 5*l. per cent.* 1 *Veſ.* 99. *June* 1748. *Swynfen* v. *Scawen.*

15. 1600*l.* being the balance of debts due to the partnerſhip at the time of the bankruptcy received by *Stephens*, or *Rowles* his executor, the executor was held anſwerable for the intereſt in the ſame manner as on the other ſums, which were part of the partnerſhip ſtock; for the debts are part of the ſtock; and therefore there is as much reaſon, that when the money was got in, he ſhould be charged with the like value as in the ſtock in trade. 1 *Veſ.* 375. *Feb.* 1749-50. *Ryall* v. *Rowles.*

16. *Suſannah Brown*, by deed-poll, depoſited in the hands of the defendant 400*l.*, which was to be for the uſe of the plaintiff, her grandſon, if he ſhould not be ſufficiently provided for during his minority by his truſtees, in ſuch manner as the defendant pleaſed; with a clauſe that the defendant, his executors or adminiſtrators, ſhould not be chargeable with intereſt. The plaintiff, now of age, by his bill prayed that the defendant might account for the intereſt of the 400*l.*: it appeared that 200*l.*, part of the 400*l.*, was the plaintiff's own money, which had been recovered in a cauſe wherein the defendant had acted as ſolicitor for *Suſannah Brown*, and in the decree there was a particular direction for placing out the eſtate, part of which this was, at intereſt for the benefit of the infant, the plaintiff. And the court ordered the defendant to pay intereſt upon that part of the money, which he muſt have known to be truſt-money, *viz.* the ſum of 200*l.* recovered as aforeſaid. 1 *Veſ.* 407. *March* 1749-50. *Brown* v. *Pring.*

17. Intereſt was allowed on the accumulated ſum reported due, being a debt under a will; but, it would have been directed on the principal ſum only, had it reſted on the report alone. And it was ſaid by Lord *Hardwicke* Chan., that intereſt by the courſe of the court was diſcretionary, and computed at 5*l. per cent.* from the 12*th of Ann.* on the ſum turned into principal by the courſe of the court; but ſix *per cent.* on the principal ſum due by covenant. 1 *Veſ.* 496. *June* 30, 1750. *Aſtley* v. *Powis.*

18. Intereſt, if generally decreed, is to be conſtrued legal; but ſtill by the nature of the fund: and if out of land, or money conſidered as land, is reduced to 4*l. per cent.* 2 *Veſ.* 239. 1750-1. *Denton* v. *Shellard.*

19. Intereſt decreed on banker's notes, on circumſtances, though there was no evidence of an agreement for it; but, it only appearing that two daughters having money advanced them by their mother, came to the banker's ſhop and demanded the money, that notes were given them for the ſame, and intereſt for ſome time paid at 4*l. per cent. viz.* for four years. 2 *Veſ.* 265. *April* 30, 1751. *Jacomb* v. *Harwood.*

20. A truſt-term created by deed for payment of debts and legacies; ſimple contract debts do not carry intereſt: ſo if by will, but otherwiſe if by deed, in the nature of a ſpecialty. 2 *Veſ.* 363. *July* 1751. *Barwell* v. *Parker.*

21. A ſcrivener or attorney is bound to place out money received for that purpoſe, for which he gives a note, and is not diſcharged from intereſt, unleſs the client or employer accepts the ſecurity upon which the money is placed, and accepts the intereſt thereon; but if the ſcrivener or attorney does not place out the money, or if he does, and does not deliver over the ſecurity and declare the truſt for his client, he is anſwerable for it himſelf, and for the intereſt too. *Ibid.*

22. Intereſt is not commonly reſerved under general directions, unleſs after a trial at law. 2 *Veſ.* 470. *July* 1752. *Champ* v. *Mood.*

23. Intereſt computed on coſts. 2 *Veſ.* 471. *July* 1752. *Bickham* v. *Croſs.*

24. Leſſor covenants for quiet enjoyment, and deviſes his real eſtates in truſt to pay debts; the leſſee is evicted, and recovers againſt the executors of the leſſor, and aſſigns the judgment; this is a debt by ſpecialty, and the aſſignees of the judgment are entitled to intereſt. But on a charge by will for payment of debts, ſimple contract debts do not carry intereſt. 2 *Veſ.* 587. *Oct.* 1751. *Earl of Bath* v. *Earl of Bradford.*

25. In this caſe, it was ſaid by Lord *Hardwicke* Chan. that the rule of the court for allowing intereſt for arrears of a jointure is not general; but the court will expect a ſpecial caſe to be made for it, as the being obliged to borrow money at intereſt. 2 *Veſ.* 662. *July* 1755. *Anon.*

26. Intereſt on a mortgage is not ſtopped, but on a proper and ſtrict tender, and notice, and not upon propoſals to deduct

upon an open account on the other ſide. *Garforth* v. *Bradley*, 2 *Veſ.* 678. *Oct.* 1755. 2 *Veſ.* 372. S. P.

27. Intereſt was ordered on further directions, though it was not reſerved by the decree. *Amb.* 584. *Oct.* 1738. *Goodyere* v. *Lake.*

28. Money raiſed by deed upon land, and inveſted in the name of a truſtee, to pay debts, the reſidue to the uſe of the truſtee; the ſimple contract debts are not changed in their nature, and ſhall not bear intereſt: but if the creditors had filed bills, and obtained ſeparate reports, from that time their debts would have carried intereſt. 1 *Bro. Ch. Rep.* 41. *Eaſt.* 1779. *Shirley* v. *Earl Ferrers.*

29. In a long unſettled partnerſhip account, rendered intricate by the neglect of a party, he ſhall have no intereſt on the balance, when ſettled. 1 *Bro. Ch. Rep.* 239. 1783. and 2 *Bro. Ch. Rep.* 2. S. C. *Boddam* v. *Riley.*

30. Where an executor or adminiſtrator keeps teſtator's or inteſtate's money in his hands a long time unemployed, or makes intereſt of it, he ſhall anſwer it. 1 *Bro. Ch. Rep.* 359. 1784. *Newton* v. *Bennett.*

31. A receiver of a public truſt, having a ſalary, making intereſt of balances in his hands, is accountable to the truſtees for intereſt made *ultra* his ſalary. 3 *Bro. Ch. Rep.* 41. *Dec.* 1789. *Earl of Lonſdale* v. *Church.*

32. An agent of an adminiſtrator keeping money of the inteſtate's in his hands, which he had propoſed to his principal to lay out in the funds, ordered to pay intereſt. 3 *Bro. Ch. Rep.* 107. *July* 1790. *Browne* v. *Southern.*

33. There being a ſurplus of a bankrupt's eſtate, intereſt was allowed to creditors, where, by the courſe of trading, and ſettled accounts, intereſt was allowed after a certain credit. 3 *Bro. Ch. Rep.* 436. *Hil.* 1792. *Ex parte Champion.* See alſo 1 *Veſ. jun.* 170. *Ex parte Goring.*

34. Aſſignees of a bankrupt kept the fund eight years without dividing; one admitted that he had lent the ſhare received by him at 5*l. per cent.*; the other, that he had lent the ſhare which he had received to a partnerſhip, in which he was engaged, with his own money, without any diſtinct charge of intereſt: he was decreed to pay ſuch intereſt as he had made, and where he had made none, 4 *per cent.* 3 *Bro. Ch. Rep.* 457. *Hil.* 1792. *Hankey* v. *Garret*, 1 *Veſ. jun.* 236. S. C. *Treves* v. *Townſhend*, 1 *Bro.* 384. S. P.

35. The court refuſed to give intereſt on the arrears of an annuity ſecured by bond in bar of dower. 3 *Bro. Ch. Rep.* 495. *March* 1792. *Tew* v. *the Earl of Winterton.*

36. In this caſe it was ſaid by Lord *Loughborough* Chan., that at law intereſt was given for every debt detained, either by contract or in damages, and decreed intereſt upon a ſimple contract debt. 1 *Veſ. jun.* 63. *Dec.* 1789. *Craven* v. *Tickell.* Sed vide 1 *Atk.* 151. *Ex parte Marlar*; and 2 *Veſ.* 589. *Earl of Bath* v. *Earl of Bradford.*

37. Intereſt

37. Intereſt *at* 4*l. per cent.* againſt aſſignees of a bankrupt for not making a dividend, when they ought to have done, decreed; and it was ſaid that 5*l. per cent.* would be ordered, if the aſſignees had made more by it. 1 *Veſ. jun.* 89. *Feb.* 1790. *Ex parte Hilliard.*

38. A brother of a lunatic, who was committee of the eſtate, and had managed it nine years before the commiſſion, during which time there were conſiderable ſavings; was ordered to pay intereſt, though alleged he made no uſe of it, unleſs there were particular circumſtances to juſtify his not doing ſo. 1 *Veſ. jun.* 156. *June* 1790. *Ex parte Chumley.*

39. Intereſt was refuſed where it was not prayed by the bill. 1 *Veſ. jun.* 156. 1792. *Weymouth* v. *Bowyer.*

40. Where intereſt was not reſerved by the decree, the court thought it could not be given on petition, the object of which was merely to carry the decree into execution. But on further directions the court may give intereſt, though it was not reſerved by the decree. 2 *Veſ. jun.* 157. *June* 1793. *Creuze* v. *Hunter*, 4 *Bro. Ch. Rep.* 316. S. C.

41. In caſe of a ſurplus coming to a bankrupt, creditors have a right to intereſt, wherever there is a contract for it appearing either on the face of the ſecurity or by evidence. 2 *Veſ. jun.* 295. *Dec.* 1793. *Ex parte Mills.*

42. The reaſon of the rule in Chancery to give intereſt at 4*l. per cent.* only, is, that money is generally to be had at that rate; but the rule is not invariable. 2 *Veſ. jun.* 511. *Dec.* 1794. *Lewis* v. *Freke.*

43. Upon a bill by executors to have the aſſets adminiſtered, no intereſt is to be allowed upon a judgment on aſſets *quando acciderint.* 2 *Veſ. jun.* 716. *Aug.* 1795. *Deſchamps* v. *Vanneck.*

44. Intereſt allowed upon a written agreement to pay by inſtalments. 3 *Veſ. jun.* 133. *May* 1796. *Parker* v. *Hutchinſon.*

45. In this caſe it was ſaid by Sir *Richard P. Arden*, Maſter of the Rolls, that intereſt was given at law upon a written undertaking to pay, or on notes payable on a day certain; not upon notes payable on a day uncertain, ſhop debts, *&c.* *Ibid.*

46. Where a fund was to be laid out in land and ſettled, and the truſtee kept it at his banker's *unproductive*, he was directed to pay intereſt after the rate of 4*l. per cent.* 4 *Veſ. jun.* 101. *July* 1798. *Young* v. *Combe.*

47. Where a mortgage upon a bankrupt's eſtate was deficient, and the mortgagee proved the remainder of his debt under the commiſſion, he was not allowed to charge intereſt beyond the date of the commiſſion. 4 *Veſ. jun.* 165. *Aug.* 1798. *Ex parte Badger.*

48. Intereſt was given at 4*l.* 10*s. per cent.* 4 *Veſ. jun.* 631. *May* 1799. *Cox* v. *Chamberlain.* See 2 *Veſ. jun.* 411, 412.

49. Separate creditors having received 20*s.* in the pound, are not entitled to intereſt out of the ſurplus of the ſeparate eſtate, until the joint-creditors have been paid 20*s.* in the pound. 4 *Veſ. jun.* 677. *June* 1799. *Ex parte Clarke.*

50. A cuſ-

50. A cuſtom in *Liverpool* for the banker to ſtrike a balance every quarter, and ſend the account to the merchant, and then to make that balance a principal to carry intereſt to the next quarter, is not uſury. 2 *Anſtr.* 495. *Nov.* 35 *G.* 3. *Cabot* v. *Walker.*

51. Money diſburſed by the mortgagee ſhall carry the ſame intereſt as the original ſum. 2 *Anſtr.* 551. *Eaſt.* 35 *Geo.* 3. *Woolley* v. *Drag.*

52. A judgment debt carries intereſt. 2 *Anſtr.* 558. 16 *May*, 35 *G.* 3. *Thomas* v. *Edwards.* 3 *Anſtr.* 804. S. C.

53. A purchaſer of a future intereſt after a term, ſhall not pay intereſt, or an increaſed price for a part of the term elapſing before the purchaſe is completed, unleſs the delay be by his fault. 3 *Anſtr.* 877. *Hil.* 27 *G.* 3. *Growſock* v. *Smith.*

24 Vin 459. **(D) In Caſes where Intereſt ſhall be allowed, *from what Time* the Allowance ſhall be.**

1. INTEREST not allowed on ſimple contract debts, but from the time of the Maſter's report confirmed; but there is no general rule that on a truſt to pay debts ſimple contract debts ſhall carry intereſt. 2 *Atk.* 111. *Jan.* 1740. *Lloyd* v. *Williams.*

2. Where the land does not yield annual profits, all debts will not carry intereſt out of a truſt for payment of debts. *Ibid.*

3. Lord *Hardwicke* Chan. ſaid, in this caſe, that an adminiſtrator was not in all caſes chargeable with intereſt on account of the perſonal eſtate in his hands. 2 *Atk.* 151. *March* 1740. *Wilkins et Un.* v. *Hunt.*

4. The court gave intereſt from the time the Maſter's report was confirmed, which was 28 years, on the arrears of an annuity, in favour of the repreſentative of an annuitant. 2 *Atk.* 212. *July* 1741. *Drapers' Company* v. *Davis.* And Lord *Hardwicke* Chan. ſaid, that intereſt was often decreed from the time the debt was liquidated, though the debt in its own nature did not carry intereſt. *Ibid.*

5. Intereſt from the time the principal became a duty decreed, at 4 *per cent.* 2 *Veſ.* 487. *July* 1752. *Earl of Pomfret* v. *Lord Windſor.*

6. Intereſt ordered to be computed, and paid on ſums reported due, from the date of the report. 4 *Bro. Ch. Rep.* 157. *Dec.* 1792. *Creuze* v. *Lowth.* Vide 2 *Veſ. jun.* 157. S. P. *Bunb.* 566.

7. Intereſt not given from the confirmation of the report upon demands liquidated by it, but not bearing intereſt in their nature, as legacies and arrears of annuities, though both legacies and annuities were charged upon land, and the annuities were not paid out of the rents and profits, becauſe poſſeſſion was taken by mortgagees, and though one of the annuities was the proviſion for a widow. 2 *Veſ. jun.* 157. *June* 1793. *Creuze* v. *Hunter.* 4 *Bro. Ch. Rep.* 316. S. C.

8. In

8. In the caſe of a mortgage the whole ſum liquidated by the report carries intereſt. *Ibid.* 159.

9. Intereſt is computed by the Maſter's report upon ſuch debts only as carry intereſt according to the rate they carry, and upon further directions ſubſequent intereſt is directed only on thoſe upon which the report has already computed intereſt: but no intereſt is computed on ſimple contract debts by the report or by order afterwards. 2 *Veſ. jun.* 165. S. C.

10. The court may give intereſt on further directions: and where a truſtee had diſobeyed an order to pay money into court, he was charged with intereſt on the ſum from the date of the order. But a ſlight difference between the ſums admitted, and thoſe reported to be in his hands not ſufficient to impute to him wilful miſconduct, or to ground a direction for an inquiry what intereſt he made of the money, or to ſubject him to coſts. 2 *Veſ. jun.* 37. *Dec.* 1792. *Saumes* v. *Rickman.*

11. Bond and judgment aſſigned, intereſt muſt be calculated to the date of the report, ſo as not to exceed the penalty. 3 *Veſ. jun.* 556. *Nov.* 1797. *Sharpe* v. *Earl of Scarborough.*

(E) *Upon Intereſt*, and in what Caſes it ſhall exceed the *Penalty*. 14 Vin. 460.

1. WHERE a creditor by judgment extends lands by *elegit*, he holds *quouſque debitum ſatisfactum fuerit*, and at law the debtor cannot on a writ *ad computandum* inſiſt on the creditors doing more than account for the extended value; but if the debtor comes here for relief, the court will give it him, by obliging the creditor to account for the whole he has received; but as he who comes for equity muſt do equity, will direct the debtor to pay intereſt to the creditor, though it ſhould exceed the principal. A creditor is not confined to the extent of the penalty upon a judgment, but may carry the computation of intereſt beyond it. 3 *Atk.* 517. *March* 1747. *Godfrey* v. *Watſon.*

2. Compound intereſt at 4*l. per cent.* allowed the tenant for life, for the remainder-man's proportion of fines paid for the renewal of a beneficial leaſe. 1 *Bro. Ch. Rep.* 440. 1785. *Nightingale* v. *Lawſon.*

3. Subſequent intereſt on a mortgage calculated on *the principal and intereſt* reported due; on bonds and legacies, on the principal only. 1 *Bro. Ch. Rep.* 574. *May* 1784. *Perkins* v. *Baynton.*

4. Intereſt upon intereſt refuſed upon the practice of the court, though the Chancellor ſaid he ſaw no reaſon why, if a man does not pay intereſt, when he ought, he ſhould not pay intereſt for that alſo. 1 *Veſ. jun.* 99. *March* 1790. *Waring* v. *Cunliffe.*

5. Arbitrators may allow compound intereſt due by contract, either expreſs or implied, from the nature of the tranſactions; and whether it be due or not, is a concluſion of fact, in which their judgment is final; but the court deſired to be underſtood not to

lay down any rule in regard to interest on mortgages. 2 *Ves. jun.* 15. *Nov.* 1792. *Morgan* v. *Mather.*

6. Interest computed on bonds only up to the penalty. 2 *Ves. jun.* 157. *June* 1793. *Creuze* v. *Hunter.* 4 *Bro. Ch. Rep.* 316, S. C.—See *Bunb.* 23. *Elliott* v. *Davis,* contra.

7. A mortgagee had also a bond, on which the interest due exceeded the penalty. The mortgagor conveyed the equity of redemption in trust for his creditors, paying this bond first. Nothing beyond the penalty can be claimed. 2 *Anstr.* 525. 24 *Feb.* 35 *G.* 3. *Lloyd* v. *Hatchett.*

8. Devise for payment of debts revives simple contract debts, even of 70 years standing, with full interest; but bond creditors can claim nothing beyond the penalty. 2 *Anstr.* 527. *Ketilby* v. *Ketilby,* cited.

14 Vin. 460. (F) *How much,* where the Debt was contracted in a foreign Country.

1. WHERE the debt was contracted in *England,* but the bond taken for it in *Ireland,* to be paid at a certain time, and at 7*l. per cent.*, it shall carry *Irish* interest. 2 *Atk.* 382. *July* 1742. *Connor* v. *Earl of Bellamont.*

2. Where a contract was made in *England* for a mortgage of a plantation in the *West Indies,* no more than legal interest shall be paid. And if in such case there is a covenant in the mortgage deed for payment of 8*l. per cent.* interest, it would be within the stat. of usury, notwithstanding this is the rate of interest where the land lies. 3 *Atk.* 727. *May* 1750.—*Stapleton* v. *Conway,* 1 *Ves.* 427. S. C.

[F]

Interrogatories.

14 Vin. 461. (A) What they are; and exhibited by whom.

1. AN adverse party may cross-examine a witness to the same point for which he is produced, but not to any new matter. 2 *Atk.* 44. *July* 1740. *Dean and Chapter of Ely* v. *Sir Simeon Stewart.*

2. A commission was prayed for examining witnesses in the *West Indies,* where the facts arose, and to stay the defendant's proceeding at law on a policy. Commission and injunction granted, the voyage being at and from *Carthagena* to *Porto Bello,* the facts must necessarily have arisen in the *West Indies.* 2 *Atk.* 359. *July* 1743. *Chitty* v. *Selwin.*

3. Though

3. Though at law you can examine only to general credit, yet it is otherwiſe in equity; for as the witneſs there cannot be prepared to defend every particular action of his life, not knowing to what they may intend to examine him; yet on an examination here he may be able to anſwer any particular charge, as he has time enough to recollect. 3 *Atk.* 522. *June* 1747. *Gill* v. *Watſon.*

Quere, whether there be any ſuch diſtinction between the examinations here and at law, with regard to examinations to the credit of witneſſes.

4. Plaintiff may ſerve any two of defendant's commiſſioners with notice of the execution of the commiſſion, and is not tied down to ſuch only as the defendant ſhould chooſe. 3 *Atk.* 633. *April* 1747. *Anon.*

5. The court will not allow articles to be exhibited againſt the *competency* of a witneſs after publication, becauſe this might have been objected to and inquired into upon the examination. 3 *Atk.* 643. *April* 1748. *Callaghan* v. *Rochfort.*

6. But the court allows ſuch articles to the *credit* of a witneſs *after* publication, becauſe the matters examined into in ſuch caſes were not material to the merits of the cauſe; though not when the commiſſion is to go to foreign parts, on account of the delay, unleſs no perſon in *England* can ſwear to the credit. *Ibid.*

7. Depoſitions *de bene eſſe*, publiſhed where there can be no examination in chief, as where the council in *Sweden* refuſed to let the commiſſion for the examination in chief be executed there. 2 *Veſ.* 325. *July* 1751. *Gaſon* v. *Wordſworth.*—2 *Veſ.* 336. S. C.; and *Amb.* 108. S. C.

8. Depoſitions *de bene eſſe* where the witneſſes are dead, and no opportunity to examine in chief, though after great length of time, publiſhed; but without prejudice to exception at the hearing. 2 *Veſ.* 497. *July* 1754. *Anon.*

9. Plaintiff, on his examination on interrogatories, charged and diſcharged himſelf in the ſame ſentence, ſufficient; but had they been in different ſentences, he muſt have proved the diſcharge. *Amb.* 589. *Oct.* 1748. *Kirkpatrick* v. *Love.*

10. Interrogatories are exhibited of courſe to falſify an examination *pro intereſſe ſuo.* 2 *Bro. Ch. Ca.* 15. *Mich.* 1785. *Rowley* v. *Ridley.*

11. Where a perſon is the only witneſs to a material fact, he may be examined *de bene eſſe.* 2 *Bro. Ch. Ca.* 641. *July* 1789. *Hankin* v. *Middleditch.*—See alſo *Lord Cholmondely* v. *Earl of Oxford*, 4 *Bro. Ch. Ca.* 157. *Dec.* 1792. S. P.

12. The examination of witneſſes, who are foreigners, muſt be in *Engliſh*, and the interrogatories and their anſwers tranſlated by ſworn interpreters. 4 *Bro. Ch. Ca.* 90. *July* 1792. *Lord Belmore* v. *Anderſon.*

13. A married woman, being in *America*, being entitled to a legacy, a commiſſion for her examination would have been directed, but as ſhe had been examined under a commiſſion iſſued by the

American Government, it was conſidered ſufficient. 3 *Veſ. jun.* 321. *Feb.* 1797. *Campbell* v. *French.*

14. Motion on behalf of one of the creditors who had proved (before the deputy remembrancer) his demand upon the eſtate in the cauſe, for leave to exhibit interrogatories to the plaintiff, to diſcover the demands due from him to the eſtate, refuſed, becauſe each creditor might claim the ſame privilege. *Anſtr.* 361. 9 *Dec.* 1793. *Bowen* v. *Webb.*

15. In a ſuit to obtain teſtimony for defence of a ſuit at law, the court will not grant a commiſſion to examine witneſſes abroad, unleſs on good grounds ſhewn, although no injunction be moved for. *Anſtr.* 880. *Hil.* 37 *Geo.* 3. *Sh.dden* v. *Baring.*

(D) Examined on *new* Interrogatories. In what Caſes.

1. NOTICE muſt be given of a motion to *add* new interrogatories for the examination of a defendant, on the examinations before put in being reported inſufficient; and an order for that purpoſe obtained upon a motion of courſe will be diſcharged. 3 *Atk.* 511. *May* 1747. *Anon.*

2. After the depoſitions under a former commiſſion had been ſeen, the court would not ſuffer additional interrogatories to be exhibited under a new commiſſion, but confined the defendant to proving exhibits, and croſs-examining a perſon already examined for the plaintiffs; but not to examine any new witneſſes. 3 *Atk.* 593. *Dec.* 1747. *Barnſly* v. *Powell.*

3. On contradictory affidavits of the ſame perſon, a perſonal examination is required. 2 *Veſ.* 26. *Oct.* 1760. *Ex parte Lord.*

4. Interrogatories and depoſitions being ſuppreſſed, leave was given to exhibit new interrogatories for the examination of the ſame witneſſes. *Amb.* 585. *March* 1739. *Lord Arundel* v. *Pitt.*

5. Witneſſes re-examined, where there was a miſtake, and that miſtake apparent. 3 *Bro. Ch. Ca.* 370. *Mich.* 1791. *Sandford* v. *Paul.*—1 *Veſ. jun.* 398. S. C.

6. Motion for leave to examine a witneſs before the examiner, after publication, who had been ſworn before publication paſſed, and all the interrogatories then given in. And this appeared to have been the practice, but the court diſapproved of it, though, as the preſent party has been deceived by it, he was ſuffered to examine his witneſs. 3 *Anſtr.* 835. 17 *Dec.* 37 *G.* 3. *Jenkinſon* v. *Sir Lucas Pepys, Bart.*

7. An interrogatory, *which went to the very giſt of the cauſe*, being ſuppreſſed as leading, the court gave leave to exhibit a freſh interrogatory. 3 *Anſtr.* 923. 29 *May*, 37 *G.* 3. *Meutill* v. *Payne and others.*

(G) Puniſhment for *Refuſal* to be *examined* thereon. 14 Vin. 464.

UPON motion that Mr. *Manley* (a witneſs) be committed for a contempt of court, in not ſubmitting to be examined before the Maſter, it was decided by the Chancellor, aſſiſted by the Maſter of the Rolls, that, after a decree, the Maſter may examine witneſſes; but ought not to do ſo by his clerk; the ſame ſubpœna iſſues as to bring them before the examiner; which is the ſame as a *ſubpœna* to anſwer: but the *label* expreſſes the purpoſe; upon an examination in the country, *the body of* the writ expreſſes, that it is to teſtify. And it was ſaid that the decrees in the Exchequer expreſs, that the Maſter is armed with a commiſſion to examine witneſſes, and power to direct the ſame to the country; and that it was ſo formerly in Chancery. After a decree, if the Maſter ſees cauſe for a commiſſion to examine witneſſes in the country, he certifies that it is neceſſary; and the depoſitions, when returned, are filed by the Six Clerk; but depoſitions taken before the Maſter are kept in their offices. 3 *Veſ. jun.* 603. *Dec.* 1797. *Parkinſon* v. *Ingram.*

Vide *Commiſſion*, *Depoſition*, *Examination*, *Hearing*, &c.

Inventory. [D]

(B) Neceſſary; in what Caſes; and the Puniſhment of not making it. 14 Vin. 464.

1. EXECUTORS made no inventory, but paid intereſt for a legacy during their lives. Decreed, by *Hardwicke* L. C., that this is evidence of aſſets; and, he ſaid, nothing is more neceſſary than to keep executors to deliver inventories. *Corporation of Clergymen's Sons* v. *Swainſon*, 1 *Veſ.* 75.

2. When the executor paid ſeveral legacies in full, and died, not having made an inventory, it was decreed by Sir *J. Strange* Maſter of the Rolls, that his repreſentatives having aſſets of the ſaid executor, ſhall pay the reſt. Not exhibiting an inventory, which every perſon ought to do, eſpecially in a deficient eſtate, is an imputation upon him, and inclines the court to bear harder upon him, becauſe he may at any time relieve himſelf by an inventory if he finds the eſtate deficient. *Orr* v. *Kaines*, 2 *Veſ.* 193.

14 Vin 446.

(C) Of what Things, and how.

1. A Fire engine ſet up for the benefit of a colliery by a tenant for life, is to be conſidered as perſonal eſtate, and goes to his executor; for it is an acceſſary to carrying on the trade of getting and vending coals, and is a matter of a perſonal nature. *Lawton* v. *Lawton*, 3 *Atk.* 13. *Lord Dudley* v. *Lord Ward*, *Amb.* 113.—*Bull. L. N. P.* 34. S. C.

2. But ſalt pans go to the heir, and not to the executor; for they are not acceſſaries to carrying on a trade, but means of enjoying the inheritance. *Lawton* v. *Salmon*, 1 *H. Black* 259

3. With regard to things otherwiſe perſonal, which have been affixed to the freehold, the rule as to whom they ſhall go obtains with moſt rigour in favour of the inheritance, and againſt the right to diſannex therefrom. *Per* Lord *Ellenborough* C. J. *Elwes* v. *Maw*, 3 *Eaſt*, 51.

3. In deciding, whether a particular fixed inſtrument, machine, or building, ſhall be conſidered as removable by the executor, as between him and the heir, the main ground is, that where ſuch inſtrument, engine, or utenſil (and the building covering the ſame falls within the ſame principle) is an acceſſary to a matter of a perſonal nature, it ſhall itſelf be conſidered as perſonalty. *Cod. Jud. Ib.* 53.

14 Vin. 466.

(D) Conſidered how; and the Effect thereof when exhibited.

1. THE executor is admitted both at law on plea of *plene adminiſtravit*, and in equity on account of aſſets, to ſhew that the money for which, by ſolemn inventory on oath, he has charged himſelf, has by accident, as, perhaps, failure of ſome great merchant, not come to his hands, ſo that the inventory is not finally binding. *Per* Sir *J. Strange*, M. R. In *Orr* v. *Kaines*, 2 *Veſ.* 193.

See 2 Fonb. 418. n.

2. The ſpiritual court has no juriſdiction to falſify, at the ſuit of a creditor, an inventory exhibited by the executor. *Cotchſide* v. *Ovington*, 3 *Burr.* 1922. *Bewick* v. *Ord*, *ib. n.*

Intire Damages. [G]

1. IN treſpaſs and falſe impriſonment, the plaintiff declared that the defendant impriſoned him the 1ſt *October*, 9 *W.* 3., and detained him in priſon for four months, and after verdict for the plaintiff and intire damages, judgment was arreſted, becauſe the declaration being of *Michaelmas* term 9 *W.* 3., and the damages being intire, and given for the impriſonment of four months from the 1ſt *October*, it appeared that the damages were given for impriſonment after the action was commenced. *Broſsfield* v. *Lee*, 1 *Ld. Raym.* 329.

2. A judgment in the Common Pleas was reverſed in the King's Bench becauſe the jury on the writ of inquiry had given damages for neceſſaries provided after the action commenced, and to a time after the writ of inquiry was executed. *Baker* v. *Bache*, 2 *Ld. Raym.* 1382.

3. It is a ſettled rule, that where there are ſeveral counts, and a verdict is entered generally on all the counts, and intire damages are given, and one count is bad, it is fatal, and judgment ſhall be arreſted. *Grant* v. *Aſtle*, 2 *Dougl.* 730.

4. And it ſhall be arreſted *in toto*, and no *venire de novo* awarded. *Trevor* v. *Wall*, 1 *T. R.* 151. *Hancock* v. *Hayward*, 3 *T. R.* 435. *per Buller* J. *Holt* v. *Scholeſield*, 6 *T. R.* 691.

5. But, where a general verdict has been taken, and *evidence been given only on the good counts*, the court has permitted the verdict to be amended by the judge's notes. *Eddowes* v. *Hopkins*, 2 *Dougl.* 376.

6. So, where it appears by the judge's notes that the jury calculated the damages on evidence applicable to the good only, the court will amend the verdict by entering it on thoſe counts, though evidence was given applicable to the bad count alſo. *Williams* v. *Breedon*, 1 *Boſ. & Pull.* 329. *Spencer* v. *Goter*, 1 *H. Bl.* 78.

7. In *Webb* v. *Turner*, the declaration was of *Michaelmas* term of an aſſault on the 18th of *October*, and an impriſonment from thence for 25 weeks, and after a verdict for the plaintiff, it was moved in arreſt of judgment that the action was brought too ſoon, and it appeared damages had been given for an impriſonment long after the action was depending; and 2 *Salk.* 662. 2 *Saund.* 169. *Cro. Jac.* 618. 1 *Vent.* 103. *Hob.* 189. *Carth.* 386. were cited in ſupport of the objection. But for the plaintiff it was argued that the *continuando* in this caſe was laid under a *ſcilicet*, and therefore, according to *All.* 22. and *Hob.* 171. 284., it will not vitiate what is properly laid in time; and that this differs from all the caſes where the time is *affirmatively* laid. And of this

opinion was the court, and the plaintiff had judgment. *Webb* v. *Turner*, 2 *Stra.* 1095. *And.* 250. S. C.—See alſo 3 *Lev.* 346. *Carth.* 261. 4 *Mod.* 152. Theſe caſes ſeem to eſtabliſh this principle, that where it is poſitively and expreſsly averred in the declaration that the plaintiff has ſuſtained damages from a cauſe ſubſequent to the commencement of the action, or previous to the plaintiff's having any right of action, and the jury give intire damages, judgment will be arreſted; but where the cauſe of action is properly laid, and the other matter either comes under a *ſcilicet* or is void, inſenſible or impoſſible, and therefore it cannot be intended that the jury ever had it under their conſideration, the plaintiff will be entitled to his judgment. Vide *Hambleton* v. *Were*, 2 *Saund.* 171. *c.* (note 1.), *Williams*'s edit.

8. A diſtinction has been taken, that where a new action may be brought, and ſatisfaction obtained, for any duty or demand which hath ariſen ſince the commencement of the depending ſuit, *that* duty or demand ſhall not be included in the judgment in the former action; as in covenant for non-payment of rent, or of an annuity payable at different times, the plaintiff may bring a new action *toties quoties*, as often as the reſpective ſums become due and payable. So in treſpaſs, and in tort, new actions may be brought as often as new wrongs and injuries are repeated; and therefore ſhall be aſſigned only up to the time of the wrong complained of. But where a man brings an action of *aſſumpſit* for principal and intereſt, upon a contract obliging the defendant to pay ſuch principal money, *with intereſt* from ſuch a time, he complains of the non-payment of both, the intereſt is an acceſſory to the principal, and he cannot bring a new action for any intereſt grown due between the commencement of his action and the judgment in it, and therefore both ſhall be included in the judgment. *Robinſon* v. *Bland*, 2 *Burr.* 1087.

[B] Joint-Tenants [and Tenants in Common].

14 Vin. 470. (A) On the Effect of a Diſpoſition to two, and the Survivor of them, and the Heirs of ſuch Survivor.

See Suppl. tit. *Abeyance*, *ante*.

(B) Of what Eſtates, Things, or Actions there may be a Survivor. 14 Vin. 471.

1. EXECUTORS taking a reſidue as executors are joint-tenants, and therefore if one die before ſeverance his ſhare ſurvives. 2 *Bro. Ch. Rep.* 220. *July* 1787. *Frewen* v. *Relfe.*

2. Mr. *Hargrave*, in note 2. *Co. Litt.* 113. *a.*, entertains the opinion, which he ſupports by a train of argument and authorities, that a power to ſell, though in itſelf a mere naked authority, yet, when given to executors, *eo nomine*, will go to the ſurvivor, by reaſon that it is annexed to their *office and character*, which itſelf ſurvives.

(E) What ſhall be ſaid a Severance of the Jointure. 14 Vin. 476.

1. *A. B.*, previouſly to her marriage, was entitled to 5300*l.* in joint-tenancy with her ſiſter *C. D.* By her marriage-ſettlement her real eſtate only was conveyed; and, with reſpect to the perſonal eſtate, the deed contained merely a recital, which amounted to nothing more than that ſhe ſhould enjoy the 5300*l.* for her ſeparate uſe; and a covenant on the part of her huſband, that ſhe ſhould enjoy it quietly. Then came theſe words; "*for* "*want of iſſue of her own body*, it ſhall go to the next of kin of "her own family." The queſtion was, whether this amounted to a ſeverance of the joint-tenancy, in the whole, or in part? Lord *Hardwicke* held it did not; for, *firſt*, here was no agreement for this purpoſe; *ſecondly*, if no agreement, there muſt be an actual alienation, and here was nothing which amounted to it, either at law or in equity: as to the words "*for want of iſſue of* "*her body*," that it ſhall go over, had theſe been ſufficient to make the iſſue purchaſers, or to give them a right to come into that court, to have the agreement carried into execution in their favour, *that* he ſhould have inclined to think a ſeverance; but, in the caſe before him, notwithſtanding theſe words, he thought the property ſtill at large, and at the wife's diſpoſal. *Partriche* v. *Powlett*, 2 *Atk.* 54. See *Moyſe* v. *Giles*, ſtated in 14 *Vin.* 525. *pl.* 9.

2. If articles amount to a ſeverance of the joint-tenancy, equity will decree performance againſt the ſurvivor. *Hinton* v. *Hinton*, 2 *Veſ.* 234.

3. Three ſiſters being joint-tenants of the premiſes, and having a leaſehold eſtate veſted in them abſolutely, by articles previous to the marriage of one of them, it was covenanted that her intereſt in the leaſehold ſhould be aſſigned abſolutely to the huſband, and her third part of the freehold ſettled to the uſe of the huſband for life, remainder to truſtees to preſerve contingent remainders, remainder to the wife for life, remainder to the firſt and

and other ſons, &c.; and the huſband covenanted, if the wife ſhould ſurvive him, or have children who ſhould ſurvive him, to pay to the truſtees 300*l.*, a ſum very inadequate to her fortune, to pay the intereſt to the wife for life, and after her deceaſe to divide the principal among the children. The wife had a ſon, who died an infant: it was held that this covenant had not ſevered the joint-tenancy. 1 *Bro. Ch. Rep.* 112. *in notis.* 1773. *May* v. *Hook.*

4. Covenant by joint-tenant to ſell ſevers the joint-tenancy in equity, though not at law. 3 *Veſ. jun.* 257. *Nov.* 1796. *Brown* v. *Raindle.*

24 Vin. 484. (K) Joint-Tenants, or Tenants in Common, by what Words, *(by Deviſe)*.

1. ONE deviſes the ſurplus of his perſonal eſtate to his four executors; this is a joint bequeſt, and on the death of one ſhall go to the ſurvivors, as well in the caſe of a legacy as a grant. 3 *P. Wms.* 115. *Trin.* 1731. *Willing* v. *Baine.*

2. Teſtatrix deviſes two houſes to *J. P.* and *J. H.* generally, and then ſays, "*my meaning is, that the rents of my two houſes ſhould* "*be* EQUALLY SHARED *between the ſaid* J. P. *and* J. H." the deviſees ſhall take as *tenants in common*, and not as joint-tenants: and *J. H.* having, on the death of *J. P.*, taken poſſeſſion of the two houſes, as ſurvivor, and enjoyed them ever ſince, muſt account for the rents as far back as the death of *J. P.*, and not from the filing of the bill. 1 *Atk.* 493. *Hil.* 1737. *Prince* v. *Heylin.*

3. Joint-tenancy is not favoured in equity, and the word *reſpectively* will ſeparate an eſtate, and make it a tenancy in common. 2 *Atk.* 122. *Feb.* 1740. *Heathe* v. *Heathe.*

4. *G. E.*, ſeiſed of a gavelkind eſtate by deed-poll, in conſideration of natural love and affection to his wife and children, did grant to his two daughters, *Margaret* and *Hannah*, the rents of his lands in *L.*, *equally* to be divided between them, paying 5*l.* to the mother during her life, and after her deceaſe to his two daughters to hold to them and their heirs, equally to be divided between them: this is a tenancy in common. 3 *Atk.* 731. *March* 1751. *Rigden* v. *Vallier.*—2 *Veſ.* 252. S. C.

5. Deviſe of reſidue of real and perſonal eſtate to two perſons, the teſtatrix, by a codicil, revokes *every legacy* given to one of them: held the other took the whole. *Amb.* 136. *Feb.* 1752. *Humphrey* v. *Toyleur.*

6. Deviſe of profits of land in truſt for his ſix younger children, to be diſtributed amongſt them in *joint* and *equal* proportions. Held a tenancy in common, at the Rolls. *Amb.* 656. *Dec.* 1767. *Ettricke* v. *Ettricke.*

7. Though the words *ſhare and ſhare alike*, in a will, generally create a tenancy in common, they cannot do ſo, where there is an expreſs

expreſs joint tenancy. 3 *Bro. Ch. Rep.* 215. *Hil.* 1791. *Armſtrong* v. *Eldridge.*

8. Gift of a ſhare over to the children of the teſtator's couſins, *ſhare and ſhare alike*, at their ages of 21, is a tenancy in common; and one dying in the lifetime of teſtator, her ſhare lapſes. 3 *Bro. Ch. Rep.* 324. *Aug.* 1791. *Martin* v. *Wilſon.*

9. A legacy given to two or more perſons, without words of ſeverance, makes a joint-tenancy; therefore, where in a will as to a reſidue two thirds were given *to and amongſt* the children of *A.* and *B.*, they took as tenants in common; but the remaining third being given to the children of *C.*, they took as joint-tenants. 4 *Bro. Ch. Rep.* 15. *July* 1792. *Campbell* v. *Campbell.*—See alſo *Morley* v. *Bird*, 3 *Veſ. jun.* 628. S. P. and *Stewart* v. *Bruce*, 3 *Veſ. jun.* 632. S. P.

See Suppl. tit. *Deviſe* (E. d), *ante.*

(L) In what Caſes they ſhall be Joint-tenants or Tenants in Common. [By *Deed*, &c.]

14 Vin. 487.

1. *A. B.* executed a deed, whereby, in conſideration of natural love and affection, and for ſettling his real and perſonal eſtate on his wife and children after his deceaſe, he gave, granted, and confirmed to his two daughters *C.* and *D. (int. al.)* the rents and profits of certain lands during the life of his wife, equally to be divided between them, paying 5*l. per annum* to his wife; and after her deceaſe, his ſaid two daughters to have the ſame lands to them and their heirs for ever, *equally to be divided between them.* Lord *Hardwicke*, after declaring his opinion, that the inſtrument operated as a covenant to ſtand ſeiſed, held that the daughters took by it *as tenants in common*; and his lordſhip, after adverting to a poſition which had been advanced, and combated, in the courſe of the argument, that deeds to uſes were to be conſtrued with leſs ſtrictneſs than common law conveyances, obſerved, that although they muſt be conſtrued alike as to words of LIMITATION, yet he ſaw no harm in conſtruing the former with greater latitude, as to words of *regulation* or *modification* of the eſtate, as the words "*equally to be divided*" were. *Rigden* v. *Vallier*, 2 *Veſ.* 252—7. 3 *Atk.* 371. S. C.—See *Marryat* v. *Townley*, ſtated in Suppl. tit. *Deviſe* (E. d), *ante.*

2. *A. B.*, by leaſe and releaſe, conveyed lands to truſtees, to the uſe of himſelf and his wife, for their lives, remainder to their children, as *A. B.* ſhould appoint; and in default, &c. to the uſe of all and every the children of *A. B.* and their heirs, *equally to be divided between them. A. B.* died, leaving children, and without making any appointment. The court of *B. R.* were of opinion, upon the authorities of *Fiſher* v. *Wigg*, and the *anon.* caſe in *Ventr.* (both ſtated in *pl.* 33. of the ſection to which this is a ſupplement), that the words "*equally to be divided*," in a deed of uſes,

as

as in the preſent caſe, created a tenancy in common. *Goodtitle* v. *Stokes*, 1 *Wilſ.* 341. See *Cox's* note 1 *P. Wms.* 14.

3. By deeds of leaſe and releaſe, lands were conveyed to truſtees, in truſt, after the marriage of the releaſor, to permit him to take the profits for 99 years, if he ſhould ſo long live; and after his deceaſe, in truſt to permit his intended wife to take the profits for her life for her jointure; and after the deceaſe of the ſurvivor, in truſt to permit the children to take the profits to them and their heirs, in ſuch ſhares, *&c.* as the ſettlor ſhould appoint; and for want, *&c.* in truſt to permit all *and every* ſuch child and children to take the profits, *&c. to them and their heirs for ever*; but, in caſe there ſhould be no ſuch child, *or in caſe ſuch child or children ſhould be all dead without child or children of their bodies living at the deceaſe of the ſurvivor of the huſband and wife*, then the truſt for the heirs and aſſigns of the ſettlor. There were ſeveral children of the marriage, and the huſband died without making any appointment. It was decreed by Lord Ch. *Thurlow*, in 1783, that the children took by the limitation as joint-tenants. From this decree a petition of appeal was preferred in 1787; and, on behalf of the appellant, it was argued, that the ultimate diſpoſition to the ſettlor was inconſiſtent with the idea of a joint-tenancy, ſince the heirs of the ſettlor were not to take till *all* the children were dead without iſſue; and therefore the children of a child who ſhould die in the lifetime of the ſettlor or his wife, ſhould be let in to take; in order to effectuate which purpoſe, the children muſt take as tenants in common, ſince otherwiſe the ſurvivors would take in excluſion of ſuch iſſue. And the word "*every*" in the limitation was ſtrongly relied upon, as implying ſeveralty. The object of the conveyance was alſo urged; and the before-ſtated diſtinction between conveyances at common law, and to uſes adverted to. But Lord *Thurlow* continued of his former opinion; and did not ſeem inclined to favour the latitude of conſtruction which was contended for in conveyances to uſes. *Stratton* v. *Beſt*, 2 *Bro. Cha. Ca.* 233.

4. Settlement of leaſehold eſtates, by articles previous to marriage, upon the ſettlor for life, and after his deceaſe to "*the children of*" the ſettlor, to be begotten on the body of his intended wife. The children were held to take as joint-tenants. *Stoplet* v. *Maurice*, (B) 7 *Bro. Parl. Ca.* 49.

See *Deviſe* (F. a), *ante*.

14 Vin. 434. (I) In what Caſes, and to what Purpoſes the Inheritance ſhall be ſaid to be *executed* in the Life of the Parties.

"WHERE land is given to two, and the heirs of one of them, he in the remainder cannot grant away his fee ſimple." *Co. Litt.* 184. *b.*

Mr.

Mr. *Hargrave*, to this paſſage, has ſubjoined the following note:

"There is a ſeeming difficulty in this paſſage. But I conceive Lord *Coke*'s meaning to be, that though, for ſome purpoſes, the eſtate for life of the joint-tenant having the fee is diſtinct from and unmerged in his greater eſtate, yet for granting it is not ſo, but both eſtates are in that reſpect conſolidated, notwithſtanding the eſtate of the other joint-tenant; and, therefore, that the fee cannot, in ſtrictneſs of law, be granted as a remainder *eo nomine*, and as an intereſt diſtinct from the eſtate for life. This explanation is confirmed by a note in *Coke upon Littleton* I have, in which it is ſtrongly obſerved, that "the two eſtates, *viz.* for life and in "fee, or rather one knotted eſtate, are ſo confounded together "in one perſon, that he cannot ſever them and make them diſ-"tinct eſtates, for he cannot grant the eſtate for life, reſerving "to himſelf the fee ſimple, nor can he grant the fee ſimple and "reſerve the eſtate for life; but he may paſs away all his in-"tereſt by feoffment, or he may forfeit all." See *Bro. Newv. Caſ. pl.* 115. It alſo much agrees with the language of Lord *Coke*'s report of *Wiſcot*'s caſe, eſpecially where he obſerves, that when an eſtate is made to three and the heirs of one, *he, who hath the fee*, cannot grant *over his remainder, and continue in himſelf an eſtate for life*, for which Lord *Coke* cites 12 *E.* 4. 2. *b.* See 3 *Co.* 61. *a.* Beſides, if the paſſage here ſhould be underſtood to ſignify that the joint-tenant, having the fee, could not in *any* form paſs away the fee, ſubject to the eſtate of the other joint-tenant, it would not only be contrary to the power of alienation neceſſarily incident to a fee ſimple, but would be inconſiſtent with Lord *Coke*'s own doctrine in a ſubſequent part of his commentary. See the caſe of an eſtate to father and ſon and the heirs of the father, *poſt.* 367. *b.* See alſo *poſt.* ſect. 578. Indeed Lord *Coke*'s poſition, thus qualified, appears to have a ſtrictneſs in it, which, with ſome, may perhaps render it queſtionable. However, he ſeems juſtified by the words of the year-book, which he cites as his authority; for they are, that, *if two have land to them and the heirs of one, he who hath fee cannot grant the reverſion of his companion to another; but, if both aliene, all paſſeth.*"

Joint-Tenants. [G]

(U) Leaſes by one. In what Caſe they ſhall bind the other. 14 Vin. 500.

TWO joint-tenants, each of them as they are ſeiſed *per my et per tout*, may make a leaſe of the whole, although his moiety will only paſs, and they will be ſeveral terms as they ariſe from

the ſeveral intereſts of ſeveral perſons, though they are the ſame in point of duration. *Per Lee* C. J. 1 *Wilſ.* 1.

14 Vin 509. (L. a) Survivorſhip. In what Caſes.

IF a joint eſtate is aſſigned in truſt, and one of the *ceſtui que truſts* dies, the truſt ſurvives for the benefit of the ſurviving *ceſtui que truſt*, againſt the creditors of the deceaſed, in equity, as well as at law. *Rex* v. *Williams*, *Hil.* 1735. *Bunb.* 342.

14 Vin. 522. (O. a) Tenants in Common. Of what.

1. IF *A.*, ſeiſed in fee, conveys to truſtees to uſes, to the uſe of his children and their heirs *equally to be divided amongſt them*, it is a tenancy in common, as well as in a will. *Goodtitle* v. *Stokes*, 1 *Wilſ.* 341.

2. Surrender of a copyhold to the uſe of *A.*, *B.*, and *C.*, and their heirs equally to be divided betwixt them and their heirs reſpectively; held by two judges a tenancy in common, by reaſon of the apparent intent of the ſurrenderor, againſt the opinion of *Holt* C. J., who thought it a joint-tenancy. *Fiſher* v. *Wigg*, 1 *P. Wms.* 14.

In note 4th to Harg. Co. Litt. 190 *b.* It is ſaid, that as this caſe, in 12 Mod. (Caſes B. R.) Lord *Raymond* and P. Wms., is reported very much at length, and the arguments on each ſide are very elaborate; it is an authority fit to be reſorted to wherever the doubt is, Whether there ſhall be a tenancy in common or a joint-tenancy? In *Stringer* v. *Philips*, 1 Eq. Ca. Ab. 291. the judgment is ſaid to have been reverſed; but that is denied by Lee, C. J. in 1 Will. 341. In *Rigden* v. *Vallier*, 3 Atk. 732. 2 Veſ. 252. the opinion of *Gould* and *Tourton* is affirmed by Ld. *Hardwicke*, contrary to the opinion of *Holt*; and the doctrine extended to a covenant to ſtand ſeiſed. In Goodtitle v. Stokes, 1 Will. 341. it is extended to the caſe of a leaſe and releaſe; and in *Doe* v. *Gaſkin*, Cowp. 660. Lord Mansfield ſays, it is certainly the better opinion, more liberal, and better founded in law.

14 Vin. 571. (P. a) Ouſter. What ſhall be ſaid an Ouſter, &c. by one of the other.

1. THE plaintiff and defendant were two tenants in common of certain cuſtomary lands, to which each of them became entitled by deſcent, and was, upon the death of his anceſtor, admitted to his undivided moiety; but the defendant *alone* had received all the rents for upwards of 26 years. The queſtion was, Whether the plaintiff was barred from recovering by the ſtatute of limitations? It was ſaid, on behalf of the plaintiff, that the ſtatute of limitations only runs againſt thoſe who are out of poſſeſſion; that coparceners, joint-tenants, and tenants in common, have a joint poſſeſſion, and the poſſeſſion of one is the poſſeſſion of both; that the perception of the profits does not amount to an expulſion; one tenant in common may indeed diſſeiſe another, but then it muſt be done by an actual diſſeiſin, and not by a bare perception of the profits only; and the ſtatute of limita-

[ ] tions

tions never runs againſt a man, but where he is actually ouſted or diſſeiſed. The court laid it down, that there muſt be an adverſe poſſeſſion, in order to enable the ſtatute of limitations to run; that there muſt be a diſſeiſin ſtrictly proved; that, in this caſe, there was no adverſe poſſeſſion, no keeping the plaintiff out of poſſeſſion; one tenant in common had received the rent, without accounting for it to the other; but there was no expulſion, no ouſter; and *Taylor* v. *Horde*, (ſtated in Suppl. tit. *Diſſeiſin, ante*) was referred to. Judgment was therefore given for the plaintiff. *Fairclaim* v. *Shackleton*, 5 *Burr.* 2604. 2 *Blac.* 690. S. C.

2. But where, upon a rule to ſhew cauſe why a new trial ſhould not be granted, Lord *Mansfield* reported, that, from the year 1734, one tenant in common had been in the ſole poſſeſſion of the lands, without any claim or demand by any perſon claiming under the other; that no *actual ouſter* was proved: but, upon the circumſtances, his lordſhip had left it to the jury to ſay, whether there was not ſufficient evidence before them to preſume an *actual ouſter*; and, ſuppoſing there was an *actual ouſter*, in that caſe, the leſſors of the plaintiff were barred by the ſtatute of limitations. The jury found, that there was ſufficient evidence to preſume *an actual ouſter*. —After the caſe had been argued, Lord MANSFIELD ſaid "It is very "true that I told the jury, they were warranted by the length of "time in this caſe, to preſume an *adverſe* poſſeſſion and *ouſter* by "one of the tenants in common of his companion; and I continue "ſtill of the ſame opinion.—Some ambiguity ſeems to have ariſen "from the term ACTUAL OUSTER, as if it meant ſome act ac- "companied by real force, and as if a turning out by the ſhoul- "ders were neceſſary. But that is not ſo; a man may come in "by a rightful poſſeſſion, and yet hold over *adverſely*, without a "title. If he does, ſuch holding over, under circumſtances, "will be equivalent to an *actual ouſter*. For inſtance, length "of poſſeſſion during a particular eſtate, as a term of 1000 years, "or under a leaſe for lives, as long as the lives are in being, "gives no title. But, if tenant *pur auter vie* hold over for 20 "years after the death of *ceſtui que vie*, ſuch holding over will, in "ejectment, be a complete bar to the remainder man or rever- "ſioner; becauſe it was *adverſe* to his title. So, in the caſe of "tenants in common, the poſſeſſion of one tenant in common, *ex* "*nomine*, as tenants in common, can never bar his companion; "becauſe ſuch poſſeſſion is not adverſe to the right of his com- "panion, but in ſupport of their common title; and by paying "him his ſhare, he acknowledges him co-tenant. Nor indeed is "a *refuſal* to *pay* of *itſelf* ſufficient, *without denying* his *title*. But "if, upon demand by the co-tenant of his moiety, the other *de-* "*nies to pay*, and *denies his title*, ſaying, he claims the whole and "will not pay, and continues in poſſeſſion; ſuch poſſeſſion is ad- "verſe and *ouſter* enough." And *Aſhhurſt* J. ſaid, that, with re- ſpect to the above ſtated caſe of *Fairclaim* v. *Shackleton*, the pre- ſent queſtion was not properly before the court in that caſe. The ſingle queſtion there was, whether the plaintiff was barred by the

ſtatute

ſtatute of limitations? The poſſeſſion was a poſſeſſion of 26 years; but, in that caſe, it was not left to the jury to preſume either an adverſe poſſeſſion or an *actual ouſter*. That fact, therefore, was not found, and it is not the province of the court, but of the jury, to preſume facts. The court was of opinion, that an undiſturbed and quiet poſſeſſion for ſuch a length of time, was a ſufficient ground for the jury to preſume an actual *ouſter*, and therefore the rule for a new trial was diſcharged. *Doe* v. *Proſſer*, Cowp. 217.

See *Davenport* v. *Tyrrell*, ſtated in Suppl. tit. *Parceners*, (L), *poſt*.

14 Vin. 512. (P. a) Ouſter. *What* ſhall be ſaid to be an *Ouſter*, &c. by the one of the other.

1. THIRTY-ſix years ſole and uninterrupted poſſeſſion by *one tenant in common*, without any account to or demand made, or claim ſet up by his *companion*, was held a ſufficient ground for the jury to *preſume* an *actual ouſter* of the co-tenant. *Fiſher and Taylor* v. *Proſſer*, 1 Cowp. 217.

2. One tenant in common ſhall not bar the other by the ſtatute of limitations, where there is no adverſe poſſeſſion. *Fairclaim on dem. of Empſon* v. *Shackleton*, 5 Burr. 2604.

3. Confeſſion of leaſe, entry, and ouſter, is ſufficient on an ejectment, in the caſe of a tenant in common, without proof of actual ouſter. *Cotes* v. *Brydon*, 3 Burr. 1895.

14 Vin. 513. (R. a) Actions. What lay at Common Law, or lie now for one Joint-tenant, &c. againſt another.

1. THE action of account given by 4 *Ann. c.* 16. is now ſeldom brought; as the party has in general a more beneficial remedy by action for money had and received, &c. or if the matter be of an intricate nature, the practice is to apply to a court of equity to compel an account. *Miſ. Treat.* 109. 111.

2. One tenant in common cannot avow *alone* for taking cattle *damage feaſant*; but he ought alſo to make cognizance as bailiff of his companion. *Cully* v. *Spearman*, 2 H. Bl. 386.

3. Neither can he maintain an action on the caſe in the nature of waſte againſt another tenant in common (in poſſeſſion of the whole having a demiſe of the moiety from the firſt) for cutting down trees of a proper age and growth for being cut. *Martin* v. *Knowlys*, 8 T. R. 145.

(Z. a) Equity. Caſes in Equity.

14 Vin. 525.

1. TRUST of a term in joint-tenancy ſhall go to the ſurvivor in equity, as well as at law. *Rex* v. *Williams*, *Bunb.* 342.

2. Five perſons purchaſed *Weſt Thorock* level from the commiſſioners of ſewers, and the purchaſe was to them as joint-tenants in fee; but they contributed rateably to the purchaſe, which was with intent to drain the level: after which ſeveral of them died: they were held tenants in common in equity; and though one of theſe five undertakers deſerted the partnerſhip for 30 years, yet he was afterwards let in. 3 *P. Wms.* 159. *Mich.* 1732. *Lake* v. *Craddock.*

3. If two tenants in common put out money as joint executors, it ſhall not ſurvive, but ſhall go reſpectively to the repreſentatives of each. 1 *Atk.* 467. *Feb.* 1736. *Partridge* v. *Pawlet.*

4. Teſtatrix deviſes two houſes *to J. P. and J. H.* generally, and then ſays, "my meaning is, that the rents of my two houſes "ſhould be *equally ſhared* between *J. P. and J. H.*" the deviſees ſhall take *as tenants in common* and not as joint-tenants; and *J. H.* having, on the death of *J. P.*, taken poſſeſſion of the two houſes, as ſurvivor, and enjoyed them ever ſince, muſt account for the rents, as far back as the death of *J. P.*, and not from the filing of the bill. 1 *Atk.* 493. *Hil.* 1737. *Prince* v. *Heylin.*

5. In the caſe of joint-tenants before ſeverance, they muſt all agree, or no act can be done; in this caſe, Mr. *Seymour* and Mr. *Bennet*, the regiſtrars of the prerogative office, not being able to agree upon a perſon to be appointed clerk, the court ordered them to draw lots, who ſhould firſt nominate a clerk to fill up the vacancy. 2 *Atk.* 482. *Dec.* 1742. *Seymour* v. *Bennet.*

6. If two perſons advance money upon a mortgage, though the conveyance be made to them jointly, it ſhall be a tenancy in common. 3 *Atk.* 734. *March* 1751. *Rigden* v. *Vallier.*

7. A tenant in common in poſſeſſion was ordered to give ſecurity for payment of the proportion of rents to his co-tenant, otherwiſe a receiver was to be appointed. 4 *Bro. Ch. Rep.* 414. *July* 1793. *Street* v. *Anderton.*

[B] Jointreſs and Jointure.

14 Vin. 540. (B) Jointreſs reſtrained, or favoured. In what Caſes.

See *Willoughby* v. *Willoughby*, ſtated in Suppl. tit. *Eſtate*, (B. b. 2), *ante*.

1. *A.* Under the will of his father, was tenant for life of certain eſtates, with a power to make a jointure, not exceeding 4000*l. per annum*, without any deduction or abatement for any *taxes, charges, or impoſitions*, impoſed or to be impoſed, parliamentary or otherwiſe, ſubject, nevertheleſs, to exiſting leaſes. *A.*, by articles, previous to his marriage with *B.*, covenanted to ſettle out of theſe eſtates to the yearly value of 3000*l.*, for a jointure, over and above all *repriſes*, purſuant to the aforeſaid power. By a ſubſequent ſettlement, reciting the power and the marriage, *A.* appointed lands to *B.*, and covenanted, that they ſhould produce 3000*l. per annum, clear of all repriſes*. *B.* ſurvived *A.*, and, after his death, entered upon the lands, which fell ſhort of producing 3000*l. per annum*, by a deficiency, *communibus annis*, of 600*l.*, the whole of which ſhe claimed to be made up to her; while, on the other hand it was inſiſted, that *taxes and impoſitions* in the power meant only fixed and permanent taxes, and not the land-tax, which was fluctuating and annual. Lord *Hardwicke* clearly thought the land-tax within the power; and conceived that the power referred to ſuch taxes and charges as were in being at the time of its execution, (*i. e.* in that court) by the articles; and that the jointreſs ſhould, on the one hand, have the benefit, or, on the other, bear the loſs of any ſubſequent variation. He reprehended the inaccuracy of the articles, in not purſuing the power; but thought the generic term *repriſes* was there intended to take in taxes, charges, or impoſitions, according to the power to which they referred. And his lordſhip, after declaring that he conſidered this as a caſe of articles unexecuted in part, was of opinion, that *B.*, by virtue of the power, and the articles, was entitled to ſuch a jointure out of the truſt-eſtate, ſubject to the power, as, at the time of executing the power, was of the yearly value of 3000*l.*, free from all incumbrances, *&c.*; and alſo from all parliamentary taxes or impoſitions of ſuch nature as were in being at the time of executing the power; and particularly the land-tax then in being. *Blandford* v. *Marlborough*, 2 *Atk.* 542.—*Tyrconnel* & *Anceſter*, 2 *Veſ.* 500. S. P.

2. But,

2. But, in *Londonary* v. *Wayne*, Lord C. *Henley* was of opinion, that, where there is a ſettlement in jointure, the yearly value of the lands cannot be fixed with juſtice till the huſband's death; ſince the wife cannot know the value but by inſpection of leaſes, or by information, if the eſtates are in hand, and the rent often varies, the landlord being frequently obliged to take boons. *Amb.* 427. See *Pinnell* v. *Hallett*, *ib.* 106.

(H) Bar of Dower. In what Caſes Jointure is a Bar. 14 Vin. 545.

1. IN *Vizard* v. *Longdale*, 5 *Geo.* 1. Sir *J. Jekyll* held, that theſe words in a bond, "to ſecure a ſum of money for her (the wife's) livelihood and maintenance," were no bar of dower. But Lord C. *King* was of opinion that they were a bar, as being within the equity of the ſtatute of jointures; and he therefore reverſed Sir *J. Jekyll*'s decree. In *Tinney* v. *Tinney*, 3 *Atk.* 8.

2. *J. S.* was ſeiſed of copyhold lands belonging to the manor of *W.*, in which there is the following cuſtom, *viz.* that the firſt wife of every tenant ſhould have her free-bench in all the lands whereof her huſband was ever ſeiſed during the coverture; the 2d wife a moiety, and the 3d a third part, ſo long as ſhe kept her huſband above ground. *J. S.*, in conſideration of a marriage and marriage portion, covenants with truſtees, that, within two months after the marriage, he would ſettle all his lands to the following uſes, *viz.* as to part of the lands, to the uſes of himſelf and his wife for their lives, remainder to the firſt ſon, *&c.* in tail-male; and, as to the other moiety, to the uſe of himſelf for life, remainder to his firſt ſon, *&c.* with a proviſo, that the lands ſo ſettled on the wife ſhould be in lieu of her cuſtomary eſtate; and one of the points in this caſe was, whether this jointure, not being made expreſsly in lieu of her dower, but only ſaid ſo in the proviſo, *and ſhe being an infant at the time of making the articles*, and not a party to them, ſhe ſhould be excluded from claiming her free-bench; and it was held, that ſhe ſhould be obliged to abide by her jointure, and *Vizard* v. *Longdale* (ſtated *ſupra*) was cited; but the Chancellor reverſed the decree, and confined her to her ſettlement. *Jordan* v. *Savage*, *Mich.* 6 *G.* 2. 3 *New Abr.* 226.

3. By an indenture made previouſly to the marriage of Sir *T. D.* with *M.*, afterwards his wife, between the ſaid Sir *T. D.* of the firſt part, the ſaid *M. D.* of the ſecond part, and *A.* and *B.* of the third part, it was, amongſt other things, agreed that *M.*, in caſe ſhe ſhould ſurvive Sir *T. D.*, ſhould have a clear annuity of 600*l.* during her life, for her jointure, and in full ſatisfaction and bar of all dower or thirds in all lands, *&c.* whereof Sir *T. D.* then was or thereafter ſhould be ſeiſed, *&c.* and Sir *T. D.* covenanted with *A.* and *B.* that his heirs, executors, or adminiſtrators ſhould pay the ſame accordingly. The deed was

executed by Sir *T. D.* and the said *M. D.* in the presence of and attested by *J. K.*, the guardian of *M. D.*; but *M. D.*, who was entitled to a fortune of about 2000*l.*, was then, and at the time of the marriage, an infant under 21. Sir *T. D.* afterwards died intestate, being seised in fee of a real estate of 2600*l. per annum*. A question arose, whether *M. D.*, being thus an infant at the time of her marriage, was, by the provision under this deed, barred of her dower, or not? Lord C. *Henley* was of opinion that she was not. From this decree there was an appeal to the House of Lords; and on behalf of the appellant it was argued, that the right of dower did not arise from contract, but was given by the law, and was exactly the same, whether the wife was of full age or not; and that jointures were given by the stat. of 27 *H.* 8. *c.* 10. *s.* 6. (which see stated in *pl.* 2. of the sect. to which this is a supplement,) as a more convenient provision, in lieu of dower at the common law; and it did not therefore depend upon the consent of the wife, that the jointure should take away her right of dower; but, having the jointure, she never gained any right of dower; that the words of the statute were general, *every woman married*, "having such jointure, shall not claim any dower," and included infants as well as adults; that were it otherwise, it might be to their disadvantage, by preventing their marriages; that the present was a good equitable jointure. The following question was then put to the judges, *viz.* "Whether a woman "married under the age of 21 years, having, before such mar-"riage, a jointure made to her in bar of her dower, is thereby "bound and barred of dower, within stat. 27 *H.* 8. *c.* 10.?" The judges were divided in their opinion, three speaking in the negative, and four in the affirmative, whereupon the decree of the court of Chancery was reversed; and it was declared, that *M. D.* was barred of her dower by the deed in question; and directions were given for securing the jointure annuity of 600*l.*, with liberty for *M. D.*, after Sir *T. D.*'s heir at law, who was then an infant, should attain 21, to apply to the court of Chancery to have the annuity charged upon his real estates. *Earl of Buckinghamshire* v. *Drury*, 5 *Bro. Par. Ca.* 570. See *Harg. note* 6. *Co. Litt.* 36. *b. Cray* v. *Willis*, 9 *Vin.* 249. 2. 3. *pl.* 18. See also the following cases, as to the powers of infants to bind their property by covenant on marriage; *Seamer* v. *Bingham*, 3 *Atk.* 54. *Harvey* v. *Astley*, *ib.* 607. *Lucy* v. *Moor*, 3 *Bro. Par. Ca.* 514. *Durnford* v. *Lane*, 1 *Bro. Ca. Ch.* 106. *Williams*, *ib.* 152. and *Slocombe* v. *Glubb*, 2. *ib.* 545.

4. By indenture made previously to the marriage of *A. B.* with *C. D.* between *M. C.* widow, the mother of *A. B.*, and the said *A. B.* of the first part, *T. W.*, the father of *C. D.*, of the second part, the said *C. D.* of the third part, and certain trustees of the fourth and fifth parts, for the considerations and for effectuating the purposes therein mentioned, *M. C.* and *A. B.* conveyed certain hereditaments to a trustee, to the intent that a recovery might be suffered thereof, which recovery, it was declared, should enure to the use

uſe of *M. C.* for life, remainder to the uſe of *A. B.* for life, remainder to truſtees during, &c., to preſerve contingent remainders, remainder, in caſe *C. D.* ſhould ſurvive *A. B.*, to the uſe of *C. D.*, in caſe the marriage ſhould take effect, for her life, as part of the jointure and proviſion agreed to be made and ſecured to her upon the treaty of the ſaid marriage, and *in lieu, bar, and recompence of all dower* and thirds, &c. which *C. D.* might otherwiſe claim in any of the lands, &c. of *A. B.*, remainder over. By another indenture, dated about ſix weeks after the firſt, and alſo previous to the marriage, and made between *T. P.*, the uncle of *A. B.* of the firſt part *E. P.*, a truſtee, of the ſecond part, *A. B.* of the third part, and *C. D.* of the fourth part, recited to be made, in order to make ſome *further proviſion for C. D.*, in caſe the marriage ſhould take effect; it was covenanted and declared, that a ſurrender therein ſtated to have been made by *T. P.* to *E. P.* of certain copyhold lands ſhould enure, after the marriage, in truſt for *T. P.* for life, remainder in truſt for *A. B.* for life, remainder, in caſe the marriage ſhould take effect and *C. D.* ſhould ſurvive *A. B.*, in truſt for *C. D.* for life, in caſe ſhe ſhould ſo long continue a widow, remainder over. This laſt deed, however, was not ſaid to be in bar of *C. D.*'s dower, or to be intended as part of her jointure, except by the expreſſion "further proviſion." *C. D.*, at the time of the marriage which afterwards took effect with aſſent of *T. W.* her father, was an infant of about 17, and had a portion of 2000*l.* *A. B.* died in the lifetime of *C. D.* ſeiſed of ſome ſmall unſettled freehold eſtates, and of a copyhold eſtate unſettled of about 400*l. per annum*, to the whole of which, by the cuſtom, the widow of a tenant dying ſeiſed was entitled for life, (as her free bench), and alſo of a perſonal eſtate of about 20,000*l.* The freehold eſtate in jointure was about 100*l. per annum*, but *M. C.* who had it for her life, was living. The copyhold eſtate in jointure was about 30*l. per annum*, and *T. C.*, who had it for his life, was dead. The queſtions were, whether *C. D.*, being an infant at her marriage, was barred of her dower and free bench by theſe ſettlements, or not; and, if not, whether ſhe ſhould have both jointure and dower, or be put to her election? Sir *R. P. Arden* at the Rolls, conceived the ſettlement made by the ſecond deed to be the other proviſion alluded to by the firſt. He then proceeded to conſider, whether, by virtue of theſe two deeds, the wife was barred of dower. He was clearly of opinion, from the caſes which he cited, that a contract entered into by an infant, though with the conſent of her guardians, did not bind her when ſhe came of age. He conceived that if, in the caſe of *Drury* v. *Drury*, or *Buckinghamſhire* v. *Drury* (already ſtated) the proviſion had not been competent, it would not have bound her; and he even doubted, whether, if a jointure *at law* was eluſory, as if 1*s.* a year or ſome ſuch thing was ſettled upon a woman, it would bind her; though on this he gave no poſitive opinion. He aſked whether it was fair to infer that, becauſe that caſe had determined that a good competent proviſion, which was equally beneficial as a

jointure at law, was a good equitable jointure, a court of equity would compel an infant to accept a jointure which was not equivalent. He thought the provision in the present case was incompetent and unjust, and therefore was not to be supported by the court. And his Honor decreed, that the widow was not bound by the two settlements, but should have her election. *Caruthers* v. *Caruthers*. At the Rolls, *MS. Rep.*

[G] Journeys.

14 Vin. 569

(A) Journeys Accounts. What it is, and Proceedings.

1. THE learning on this subject is now of little use, it being customary to enter a judgment that the writ be quashed, and then to sue out another.

2. And by stat. 8 & 9 *Will.* 3. *c.* 11. *f.* 7. the death of one plaintiff or defendant, where there is another surviving, shall not abate the suit. The death to be suggested on the roll. And by *f.* 6. death of the party, after interlocutory judgment, shall not abate the suit.

3. If a plaint be levied in an *inferior* court within the six years, and then it is removed into the king's bench by *habeas corpus*, and the plaintiff declares here *de novo*, and the defendant pleads the statute of limitations, the plaintiff may reply, and shew the plaintiff in the inferior court, and that will be sufficient to avoid the statute. 1 *Lord Raym.* 553. 2 *Stra.* 719. 2 *Lord Raym.* 1427. S. C.

4. If a new action be brought within half a year, after the abatement of the former, it would be sufficient to avoid the statute. 2 *Comp.* 738, 40.

[D] Ireland.

14 Vin. 566.

(A) How far bound by *English* Statutes.

1 22 GEO. 3. *c.* 53. was made to repeal the 6 *G.* 1. by which the dependency of *Ireland* was asserted and declared.

2. 23 *G.* 3. *c.* 28., the right claimed by the people of *Ireland* to be bound only by laws enacted by his majesty and the parliament

ment of that kingdom, in all caſes whatever, and to have all actions and ſuits at law or in equity inſtituted in that kingdom decided in the courts there finally and without appeal, is declared to be eſtabliſhed and aſcertained for ever.

3. By 40 *G.* 3. *c.* 67. the kingdoms of *Great Britain* and *Ireland* are united into one kingdom by the name of the United Kingdom of *Great Britain* and *Ireland*.

Judgment. [G]

(D) In what Caſes, after a Verdict, Judgment ſhall *not* be given *upon the Verdict*, but upon the *Declaration*, *Plea*, or other Part of the Record. 14 Vin. 585.

WHERE the plea confeſſes the action, and does not ſufficiently avoid it, judgment ſhall be given on the confeſſion, without regard to a verdict. *Broome* v. *Rice*, 2 *Stra.* 873.

(F) Releaſe. What collateral Act will hinder a Judgment, *viz.* Releaſe *to one of the Defendants*. 14 Vin. 591.

1. A *Remittit damna* of ſo much is a releaſe for ſo much, and is like acknowledgment of ſatisfaction, and there need be no judgment *quod eat ſine die* as to that part. *Eyre* v. *Mount.* *H.* 9 *G.* 2. *B. R. H.* 207.

2. If two are jointly and ſeverally bound, a releaſe to one diſcharges the other. 1 *Lord Raym.* 691.

3. Where the ſum demanded depends upon a deed or other inſtrument, and on nothing *extrinſic*, as in debt or covenant to pay 20*l.*, there can be no *remittitur*, for the variance which is made is inconſiſtent with the deed or inſtrument upon which the duty demanded depends; otherwiſe, where it may be more or leſs by matter extrinſic; as in debt for rent, if more be demanded than is due, the overplus may be releaſed; for the variance is not *inconſiſtent with the deed*, and as the plaintiff is to recover on the trial only what appears in evidence to be due, ſo on demurrer he is to have judgment for no more than he ought to recover, and may remit the reſt. *Incledew* v. *Cripps*, 2 *Salk.* 659. 7 *Mod.* 87. S. C. 2 *Lord Raym.* 814.

14 Vin. 503. (G) Where a *Releaſe, or Nolle Proſequi of Part* of the Thing will be a Releaſe of all.

1. IN treſpaſs againſt ſeveral, a *nolle proſequi* may be entered as to one, and it ſhall not releaſe the other. 1 *Wilſ.* 90.

2. It ſeems that in an *aſſumpſit*, or other action upon contract, againſt ſeveral defendants, the plaintiff cannot enter a *nolle proſequi* as to one, unleſs it be for ſome matter operating in his perſonal diſcharge, without releaſing the others. 1 *Wilſ.* 90.

3. It ſeems clear that when any action founded upon a *tort*, ſuch as aſſault and battery, falſe impriſonment, trover, and the like, is brought againſt ſeveral defendants, though they all join in the ſame plea, and be found jointly guilty, yet the plaintiff may after verdict enter a *nolle proſequi* as to ſome of them, and take his judgment againſt the reſt. *Coux* v. *Lowther*, 1 *Lord Raym.* 597. *Dale* v. *Eyre*, 1 *Wilſ.* 306.

14 Vin. 503. (G. 2) Aided by Releaſe of Damages, or what elſe would make Error.

1. WHERE in an action againſt ſeveral defendants the jury by miſtake have aſſeſſed ſeveral damages, the plaintiff may cure it by entering a *nolle proſequi* as to one of the defendants and taking judgment againſt the others; or he may enter a *remittitur* as to the leſſer damages; or even without entering a *remittitur*, he may take judgment againſt all the defendants for the greater damages. 1 *Wilſ.* 30.

2. Where the jury give greater damages than the plaintiff has declared for, it may be cured by entering a *remittitur* of the ſurplus, before judgment. 2 *Stra.* 1110. 2 *Tidd's Prac.* 798.

3. Where the duty to be recovered is certain and entire, upon the face of the contract, or ſpecialty, a demand of more than is due is bad, and cannot be aided by the entry of a *remittitur*; but where the duty is compoſed of ſeveral parcels, a demand of more than is due may be aided by a *remittitur* of the overplus, for the plaintiff muſt recover according to the proof, and not to the demand. *Inchedew* v. *Cripps*, 2 *Lord Raym.* 815.

14 Vin. 602. (N) When a Plea is *good for Part, and ill for other Part, how Judgment* ſhall be given.

1. IF two or more join in a defence which is a ſufficient juſtification for one, but no juſtification for the others, the plea is bad as to all; for the court cannot ſever it, and ſay that one is guilty, and the other not, when they all put themſelves upon the ſame terms. *Philips* v. *Biron*, 1 *Stra.* 509.

2. Treſpaſs

2. Treſpaſs and falſe impriſonment againſt five defendants. They all join in a plea of not guilty as to all but eight days impriſonment, which they juſtify under proceſs from the univerſity of *Oxford*; but this proceſs being no juſtification to ſome of the defendants, though it might be as to the others, judgment was given againſt all the defendants. *Smith* v. *Bouchier*, 2 *Stra.* 994.

3. In treſpaſs and falſe impriſonment againſt the plaintiff in the action and the officer, they jointly juſtified under a proceſs from the court at *Welch Pool*, returnable at the next court. And it not being ſhewn that any return was made, the court held that the officer was a treſpaſſer *ab initio*, and that the plaintiff, by joining with him in the plea, is equally affected by the defect of it. And therefore there was judgment againſt them both. *Middleton* v. *Price*, 2 *Stra.* 1184.

(O. 2) Judgment *againſt whom*, when two are ſued and one acquitted. 14 Vin. 605.

THERE is a difference between an action of conſpiracy againſt two perſons, and an action upon the caſe founded on a wrong done by two perſons; in the firſt, if one be found not guilty, the judgment muſt be arreſted, but not if one be found not guilty in the latter caſe. *Subley* v. *Mott*, 1 *Wilſ.* 210.

(P) By Prayer. 14 Vin 606.

A Replication to a plea in abatement, traverſing any of the facts in the plea, muſt pray a judgment in chief. *Bonner* v. *Hale*, 1 *Lord Raym.* 338.

(Q) *In what Actions.* Judgment being given ſhall be a Bar of others. (Actions of another Sort.) 14 Vin. 608.

1. AN account ſtated is no plea in bar to a demand of a debt of the ſame nature. *Roades* v. *Barnes*, 1 *Burr.* 9.

2. A note of hand cannot be pleaded in bar to an action upon ſimple contract; though a bond may, but not one bond to another. *Ibid.*

3. A *ſuperſedeas* obtained *after judgment* cannot be pleaded in bar to an action on ſuch judgment. *Topping* v. *Ryan*, 1 *Term Rep.* 273.

4. If a ſervant, ſeduced from his maſter, has paid the penalty ſtipulated by his articles for leaving him, this is a bar to an action againſt the perſon ſeducing him. *Bird* v. *Randall*, 3 *Burr.* 1345.

5. A judgment for a defendant on one perſonal action, is a good bar to another perſonal action for the ſame cauſe. But the cauſe of action muſt be ſpecially ſtated to be the ſame. As where the

the defendant, being a creditor to a bankrupt, had ſigned judgment on a bond of the bankrupt's on the 9th *March*, and ſued out a writ of *fi. fa.* thereon, under which the ſheriff levied the money; on the 9th *April* the commiſſion was ſued out, and in *Michaelmas* term following the aſſignees brought trover for the goods ſo taken under the execution, and had a verdict againſt them. They afterwards brought *aſſumpſit* for the money ariſing from the ſale of the ſame goods, the defendant having pleaded the former recovery in trover, it was held ill, for *want of the proper averment* to ſupport the plea, *viz.* That the *queſtion or cauſe of action was the ſame.* Afterwards the parties going to trial on other iſſues, the ſpecial matter further found was, that the bankrupt had committed an act of bankrupty before the 9th *March*, *viz.* in the *February* preceding, but the court held clearly that the aſſignees having failed in the action of trover, could not recover in *aſſumpſit* for the price of the ſame goods. And the teſt when one action ſhall be a bar to another is, when the ſame evidence is required in both actions, as was the caſe in this. *Hitchen* v. *Campbell*, 2 *Bl. Rep.* 827. 3 *Wilſ.* 304.

14 Vin. 610. (Q. 4) Judgment or Recovery in one Action, where a Bar in another, being brought by the ſame or by different Perſons.

A Judgment for the defendant in trover is no bar to an action for money had and received by the defendant for the uſe of the plaintiff. —— v. *Campbell*, 3 *Wilſ.* 240.

14 Vin. 612. (T) In what Caſes one or ſeveral Judgments ſhall be given; and what ſhall be ſaid one and what ſeveral Judgments.

1. WHERE the count was of a *joint* treſpaſs, and the jury found the defendants guilty of a *joint* treſpaſs, and yet ſevered the damages: the court were of opinion that in *ſuch* caſe the damages *could not be ſevered.* And the judgment was therefore reverſed. *Hill* v. *Goodchild*, 5 *Burr.* 2791.

2. One fine cannot be aſſeſſed on the admiſſion to *ſeveral* copyhold tenements. If any count in the declaration ſtate one fine, although the other ſtate ſeveral, and there are entire damages, and judgment for the plaintiff, it is error. *Grant* v. *Aſtle*, 2 *Dougl.* 722.

14 Vin. 621. (X. 5) *Revived* by *Scire Facias.*

1. IN *Coſgayne* v. *Fly*, 2 *Bl. Rep.* 995. on a judgment of above twenty years old; and in *Bagnall* v. *Gray*, *ib.* 1140. on a judgment of ten years old, the court of *C. B.* gave leave to ſue out

out a *ſci. fa.*; but execution only to iſſue on a return of *ſcire feci*, or an affidavit of perſonal ſervice on the defendant.

2. If an executor bring a *ſcire facias* on a judgment or recognizance, and obtain judgment *quod habeat executionem*, and die inteſtate, the adminiſtrator *de bonis non* muſt bring a *ſcire facias* on the original judgment, and cannot proceed upon the judgment on the *ſcire facias*. *Semble Ld. Raym.* 1049.

3. If the plaintiff in an action after judgment and a writ of error allowed, become bankrupt, his aſſignees cannot ſue out a *ſci. fa.* in their own names to compel an aſſignment of errors till ſome judgment be given, and then it muſt be done immediately after ſuch judgment; but they ſhould go on with the writ of error in the bankrupt's name till judgment. 1 *T. R.* 463. Vide 3 *T. R.* 437.

4. The huſband cannot have execution for the coſts on a plea of *coverture* found for the defendant, without a *ſcire facias*. 2 *Dougl.* 637.

5. A *ſcire facias* on a judgment muſt purſue the terms of the judgment. And therefore where an executor pleads *plene adminiſtravit*, and the plaintiff does not take iſſue on it, but takes judgment of aſſets *quando acciderint*, the *ſcire facias* on that judgment muſt pray execution of ſuch aſſets only as have come to the executor's hands ſince the former judgment; and if it prays execution of aſſets generally, without confining it to that time, it cannot be ſupported. *Mara* v. *Quin*, 6 *T. R.* 1.

6. The year muſt be computed from the day of ſigning judgment. *Sympſon* v. *Gray*, *Barnes*, 197.

7. And it is to be reckoned by calendar months, and not by terms. *Winter* v. *Lightbound*, 1 *Stra.* 301.

8. If the plaintiff has been prevented from ſuing out execution within the year, by the defendant's obtaining an injunction out of Chancery, he may ſue out execution afterwards without a *ſcire facias*. *Michel* v. *Cue*, 2 *Burr.* 660.

9. The *ſcire facias* muſt be ſued out of the ſame court where the judgment was given, if the record remains there. *Com. Dig.* tit. *Pleader* (3 L. 3).

10. If the judgment be of more than *twenty* years ſtanding, there muſt be a rule to ſhew cauſe, ſupported by an affidavit that the judgment is unſatisfied. *Blakely* v. *Vincent*, *T.* 35 *G.* 3. *Waters* v. *Hales*, *E.* 37 *G.* 3. cited *Tidd's Prac.* 404.

11. In debt on bond, conditioned for the payment of money by inſtalments, where the proceedings are ſtayed on payment of one or more inſtalments, judgment is entered as a ſecurity for the remainder, with a ſtay of execution till they become due; and in ſuch caſe there ſeems to be no neceſſity for a *ſcire facias* if execution be taken within a year after each default. *Darby* v. *Wilkins*, 2 *Stra.* 957. S. P. 2 *Bl. Rep.* 706.

12. It has been holden that no *ſpecial* execution can be taken out on a *general* judgment againſt a defendant, before his diſcharge under an inſolvent act, without firſt ſuing out a *ſcire facias*. *Buxton* v. *Mardin*, 1 *Term Rep.* 80.

13. Where

13. Where a new perſon, who was not a party to a judgment, derives a benefit by, or becomes chargeable to the execution, there muſt be a *ſcire facias* to make him a party to the judgment. *Penoyer* v. *Brace*, 1 *Ld. Raym.* 245.

14. Where there are two or more plaintiffs or defendants in a perſonal action, and one or more of them die after judgment, execution by *fi. fa.* or *ca. ſa.* may be had for or againſt the ſurvivors, without a *ſcire facias*. *Penoyer* v. *Brace*, 1 *Ld. Raym.* 215.

15. If a verdict be found on a plea of coverture, for the wife, who has been ſued as a feme ſole, it has been determined that it is irregular to ſue out execution for the coſts in the name of huſband and wife without a *ſcire facias*; but the wife may take out execution in her own name, becauſe the plaintiff having declared againſt her as ſole is concluded from denying it. *Woolley* v. *Rainer*, 2 *Dougl.* 637.

16. Where the defendant dies after interlocutory, and before final judgment, the plaintiff muſt ſue out two writs of *ſcire facias* to entitle himſelf to take out execution; one before final judgment to make the executors or adminiſtrators parties to the record; the other after final judgment to give them an opportunity of pleading the want of aſſets, or any other matter that an executor may plead in his defence to a *ſcire facias* brought upon a final judgment againſt his teſtator; for it would be unreaſonable that the executors or adminiſtrators ſhould be in a worſe ſituation, where their teſtator or inteſtate died before final judgment than they would have been in if he had died after. *Tomkins* v. *Gratton*, *Say. Rep.* 266.

17. If an executor brings a *ſcire facias* on a judgment, and has judgment *quod habeat executionem*, and dies inteſtate, the adminiſtrator *de bonis non* muſt bring a *ſcire facias* upon the original judgment, and cannot proceed upon the judgment in the *ſcire facias*. *Treviban* v. *Lawrence*, 2 *Ld. Raym.* 1049.

18. A *ſcire facias* to revive a judgment entered on a bond ſecuring an annuity granted before ſtat. 17 *G.* 3. *c.* 26. *ſ.* 2. commanding that no *action* ſhall be brought on any judgment already entered, (unleſs certain requiſites were complied with) is an action within that clauſe. *Fenner* v. *Evans*, 1 *T. R.* 269.

19. A *ſcire facias* to revive a former judgment is ſo far a continuation of the ſame action, that if the plaintiff's teſtator had agreed not to bring a writ of error in that former action, ſuch agreement ſhall bind his executors upon the *ſcire facias* being brought againſt them. *Executors of Wright* v. *Nutt*, 1 *T. R.* 388.

24 Vin. 621.

(Y) When to be ſigned and entered.

1. IN debt for a penalty for non-performance of covenants, judgment on demurrer may be entered up for the penalty, in like manner as before the ſtat. 8 & 9 *W.* 3. *c.* 11.; but then it can ſtand only as *ſecurity* for the *damages ſuſtained*. *Goodwin* v. *Crowle*. 1 *Cowp.* 357.

2. Plaintiff

2. Plaintiff is not obliged to proceed to final judgment next term after trial, therefore if verdict in *Hil.* vac. defendant renders himſelf in *Eaſter*, and plaintiff might have final judgment, but does not ſign it till *Trinity*, and in *Michaelmas* charges defendant in execution, it is well, and defendant is not entitled to *ſuperſedeas*. *Pierce* v. ——, *H.* 24 *G.* 2. 1 *Wilſ.* 297.

3. The court will give leave in the firſt inſtance to enter up judgment on a verdict reduced by an award. *Higginſon* v. *Neſbitt*, 1 *Boſ. & Pull.* 97.

4. The court will not order plaintiff's attorney to bring in and enter up judgment on the motion of a ſtranger, though in order that it may be uſed as evidence on a penal ſtatute. *Hudſon* v. *Smith*, *M.* 11 *G.* 2. *Andr.* 22.

5. If plaintiff in an action for arrears, dies before judgment on a ſpecial verdict, judgment may be entered as of the term in which the *poſtea* was returnable. *Trelawney* v. *Wincheſter*, 1 *Burr.* 219.

6. Where defendant dies pending time of argument or conſideration of the court, judgment entered *nunc pro tunc*. *Aſtley* v. *Reynolds*, 2 *Stra.* 915.

7. If defendant in error dies pending a *cur. adviſare vult*, the court will give leave to enter judgment *nunc pro tunc*. *Cumber* v. *Wane*, 1 *Stra.* 426.

8. The court will not give leave to enter up a judgment of 20 years ſtanding *nunc pro tunc*. *Flower* v. *E. Bolingbroke*, 1 *Stra.* 639.

9. If defendant dies after judgment pronounced for him, the court will give leave to enter it up as of that term, though the application is ſix or ſeven terms after. *Norwich* v. *Berry*, 4 *Burr.* 2277.

10. If an executor receive aſſets between the time of the plaintiff's ſuing out the writ and a judgment *quando acciderit*, upon *plene adminiſtravit* pleaded, the court will permit the plaintiff, in his *ſcire facias*, to amend his judgment as to the time, when he could at the ſooneſt have entered it up, unleſs the defendant can ſhew, that in point of fact ſome injuſtice will be done by it in the particular caſe. *Mara* v. *Quin*, 6 *T. R.* 1.

11. By rule of *C. B.*, *E.* 12 *G.* 2., it is ordered, that after the firſt day of the then next term, all *poſteas* and inquiſitions, on which final judgments are ſigned, ſhall be left with the prothonotaries, in order that the judgment may be immediately entered. *Barnes*, 259.

12. By rule of *B. R.* and *C. P. Hil.* 35 *G.* 3. it is ordered that after the firſt day of the next term no judgment ſhall be ſigned for non-payment of iſſue-money; but that it ſhall remain to be taxed as part of the coſts in the cauſe. 6 *T. R.* 218. 2 *H. Bl.* *Fuller* v. *Oſborne*, 6 *T. R.* 477.

13. The court will not allow a plaintiff to ſign judgment, becauſe the defendant refuſes to pay for half the paper-books delivered to the Judges, the caſe being within the above rule. *Fulham* v. *Bagſhaw*, 1 *Boſ. & Pull.* 292.

14. Plain-

14. Plaintiff cannot ſign judgment for the defendant's refuſing to pay 4*d.* for the warrant of attorney when the copy of the declaration is delivered to him. *O'Neale* v. *Price*, 4 *T. R.* 370.

15. Where either party dies after verdict in vacation, judgment may be entered at common law in that vacation, as of the preceding term. *Barnes*, 266. 1 *Ld. Raym.* 695. 2 *Ibid.* 766. 849. 869. 6 *T. R.* 368. 7 *Ib.* 20. In ſuch caſe, the roll ought to be brought in and filed before the eſſoign day of the ſubſequent term.

16. So where either party dies after verdict, judgment may, under 7 *Car.* 2. *c.* 8., be entered ſo as to ſupport the proceedings at any time within two terms after the verdict. And at common law, if either party dies after ſpecial verdict, and pending the time for argument, *&c.* thereon, or on demurrer, motion in arreſt of judgment, or for a new trial, judgment may be entered after the death, as of the term in which the *poſtea* was returnable, or in which judgment would otherwiſe have been ſigned *nunc pro tunc*. *Tidd's Prac.* 840. 842. 853.

17. Plaintiff cannot ſign judgment for want of a plea without demanding one; though the defendant has not taken the declaration out of the office. *White* v. *Dent*, 1 *Boſ. & Pull.* 341.

18. If defendant's attorney has undertaken to appear, judgment may be ſigned though appearance is not actually entered. *Barnes*, 238.

19. If declaration is left in the office before appearance or notice, then appearance, and then notice in another term, and judgment ſigned next term, it is good; for the declaration is only well delivered from the notice. *Barnes*, 242.

20. If defendant has time, on terms of pleading iſſuably, and puts in a ſham demurrer, judgment may be ſigned; but not if it is a fair demurrer. *Gray* v. *Aſhton*, 3 *Burr.* 1788.

21. If defendant, when under an order to plead iſſuably, puts in a plea, which, though informal, goes to the ſubſtance of the action, the plaintiff cannot ſign judgment as for want of a plea. *Thelluſon* v. *Smith*, 5 *T. R.* 152.

22. Judgment was ſigned on the 2d of *November*, plaintiff filed common bail on the 3d, and a rule was granted to ſhew cauſe, why the judgment ſhould not be ſet aſide for irregularity. The rule was, however, diſcharged upon its being ſtated by the Maſter to be the conſtant practice to ſign judgments on the 2d of *November* before the eſſoign-day, in all caſes where common bail is filed between the 2d and the 6th *November*. *Wanſey* v. *Moore*, 5 *T. R.* 65.

23. In *B. R.* judgment may be ſigned for want of a plea at any time after twenty-four hours from the time of the plea demanded. *Dyche* v. *Burgoyne*, 1 *T. R.* 454.

24. And this is the rule, whether the time for pleading be or be not expired when ſuch demand is made. *Rowles* v. *Edwards*, 4 *T. R.* 118.

25. Where the declaration, filed in the office before defendant's appearance, was endorſed, *filed conditionally*, and judgment afterwards

wards signed for want of a plea, the court held it irregular, though the notice served on the defendant was of a declaration *generally*. *Cort* v. *Jacques*, 8 *T. R.* 77.

26. If process is returnable 15th *November*, declaration, with notice to plead in eight days, left in the office 24th *November*, and defendant does not plead nor file common bail, and plaintiff files common bail, and signs judgment after, it is well. He might have signed it immediately after the eight days. *Shadwell* v. *Angell*, 2 *Burr.* 55.

27. No proceedings having been had for above a year, the plaintiff, two days before *Hilary Term*, gave notice of his intention to proceed. Two days after the term he served a rule to plead, and the same vacation judgment was signed for want of a plea, which was held regular. *Milbourne* v. *Nixon*, 2 *T. R.* 40.

28. If defendant do not rejoin, the plaintiff may strike out the previous pleadings and enter judgment as for want of a plea. *Petrie* v. *Fitzroy*, 5 *T. R.* 152.

29. To an action of debt on bond, the defendant pleaded *solvit ad diem*, and entered it in the general-issue book; the plaintiff was thereby enabled to sign judgment as for want of a plea, it being considered as a waiver of the imparlance to which the defendant was entitled. *Lockhart* v. *Mackreth*, 5 *T. R.* 661.

30. If declaration is left in the office *de bene esse* and notice given, defendant must take it out and pay it, or plaintiff may refuse plea and sign judgment. *Keeling* v. *Newton*, 1 *Wilf.* 173.

31. Judgment cannot be signed till summons for time is discharged, though defendant's attorney did not attend. *Barnes*, 240. 255.

32. On order for two days' time, judgment cannot be signed till third day in the afternoon. *Barnes*, 266.

33. Though a rule to plead expire on a *dies non* the defendant is bound to plead on or before that day, and if he do not, judgment may be signed against him on the next day. *Mesure* v. *Britton*, 2 *H. Bl.* 616.

34. On a rule to plead, *&c.* in four days, if the defendant delay till the morning of the 5th day, the plaintiff may sign judgment. *Haselar* v. *Ansell*, 1 *Dougl.* 197.

35. On a rule to plead, reply, *&c.* in four days, if the party on whom the rule is made delay complying with it till the morning of the 5th day, the adverse party may refuse to receive it, and sign judgment. *Thomson* v. *Ryall*, 4 *T. R.* 195.

(C. a) Arrest of Judgment, for what; how; when. 14 Vin. 628.

1. JUDGMENT after verdict shall not be arrested for an objection that would have been good on demurrer. Thus, in debt on security-bond of a bailiff of *G.* hundred, conditioned if he duly executes his office *within* that hundred, and executes all warrants directed to him, and makes due returns, then, &c. plea of

of performance; replication, that defendant had not duly executed a warrant directed to him; rejoinder, he had: verdict againſt him: he ſhall not arreſt judgment, becauſe it is not alleged, that the warrant was directed to him as bailiff of G. hundred. *Weſton v. Maſon*, 3 *Burr.* 1725.

2. *Per Curiam.* After judgment on demurrer, defendant ſhall not come to arreſt judgment on the return of the inquiry, for an exception that might have been taken on arguing the demurrer. *Secus*, in caſe of judgment by default, or if the fault ariſes on writ of inquiry, or verdict. *Edwards v. Blunt*, 1 *Stra.* 425.

3. It is now ſettled, (though otherwiſe formerly) that judgment cannot be arreſted for *extrinſic* or foreign matter, not appearing on the face of the record, but the Court are to judge upon the record itſelf, that their ſucceſſors may know the grounds of their judgment. 1 *Ld. Raym.* 232. 4 *Burr.* 2287.

4. At common law, where any thing is omitted in the declaration, though it be matter of ſubſtance, if it be ſuch as that, without proving it at the trial, the plaintiff could not have had a verdict, and there be a verdict for the plaintiff, ſuch omiſſion ſhall not arreſt the judgment. 1 *T. R.* 141. 3 *Ibid.* 147. 7 *Ibid.* 518.

5. This rule is, however, to be underſtood with ſome limitation, for it appears to be, that where the plaintiff has ſtated his title or ground of action defectively or inaccurately, it is a fair preſumption, after verdict, that they were proved; but that where the plaintiff totally omits to ſtate his title or cauſe of action, it need not be proved at the trial, and therefore there is no room for ſuch preſumption. 2 *Dougl.* 679.

6. After verdict the Court will do what they can to help the declaration, but not after judgment by default: ſo, if plaintiff has not averred performance or readineſs to perform what was to be done on his part, judgment ſhall be arreſted. *Collins v. Gibbs*, 2 *Burr.* 899.

7. *Sunday* is not eſteemed one of the four days within which arreſt of judgment ſhall be moved for. 4 *Burr.* 2130. 2 *Dougl.* 745.

8. Motion in arreſt of judgment on the crown ſide may be made at any time before ſentence pronounced. 2 *Burr.* 799.

9. Motion in arreſt of judgment muſt be on the appearance day of the return of *hab. cor. jur.* *Barnes*, 445.

10. If it is to be moved the laſt day of term, there muſt be notice given. *Barnes*, 247.

11. Defendant in an indictment may move in arreſt of judgment any time before judgment ſigned. *Rex v. Hays*, 2 *Stra.* 843. 5 *T. R.* 445. Though a new trial has been previouſly moved for. *Taylor v. Whitehead*, 2 *Dougl.* 745.

12. If there is a demurrer to one count, and a verdict for plaintiff on the other, judgment cannot be arreſted till the demurrer is determined, for till then the proceedings are not complete. *Goodright v. Hodgſon*, *Andr.* 282.

13. The court will not arreſt the judgment in an action for words in one count, though ſome of them be not actionable. *Secus*, where there are two counts, and a general verdict is given for the plaintiff. *Lloyd* v. *Morris*, *Willes*, 443.

14. If ſome counts in a declaration are good, and ſome bad, and general damages are given, the court will arreſt the judgment *in toto*, and will not award a *venire de novo*. *Holt* v. *Scholefield*, 6 *T. R.* 691.

15. *A.* having declared on a promiſſory note againſt *B.*, made by *C.* to *A.*, by him indorſed to *B.*, and by him again indorſed to *A.*, and having obtained a verdict, the judgment was arreſted on the ground of a circuity of action. *Biſhop* v. *Haywood*, 4 *T. R.* 470.

16. Where in an action of *aſſumpſit* on a bill of exchange with the uſual money counts, the defendant pleads *nil debet* to the count on the bill, but does not plead at all to the other counts, after a verdict for the plaintiff the defendant ſhall not take advantage of his own miſpleading in arreſt of judgment. *Harvey* v. *Richards*, 1 *H. B.* 644.

(D. a. 2) Set aſide, for what and how. *Irregularity* in ſigning it. Want of or Inſufficiency in a Plea.

14 Vin. 630.

1. JUDGMENT may be ſigned for want of a plea at any time after 24 hours from the time of the plea demanded. *Dyche* v. *Burgoyne*, 1 *T. R.* 454.

2. But plaintiff cannot ſign judgment for want of a plea till the expiration of 24 hours after demand of plea, whether the time for pleading be or be not expired when ſuch demand is made. *Rowles* v. *Edwards*, 4 *T. R.* 118.

3. If defendant, being under an order to plead iſſuably, plead ſeveral pleas, one of which is not iſſuable, the plaintiff may ſign judgment as for want of a plea, though the others be iſſuable pleas; for the plea which was pleaded in diſobedience to the order vitiated all the others. *Waterfall* v. *Glode*, 3 *T. R.* 305.

4. Where a defendant, when under an order to plead iſſuably, put in a plea, though informal, which went to the ſubſtance of the action, the court held that the plaintiff could not ſign judgment as for want of a plea. *Thelluſon* v. *Smith*, 5 *T. R.* 152.

5. If the defendant ſuffer plaintiff to file common bail for him under the ſtatute, the latter may, upon the expiration of the rule to plead, ſign judgment for want of plea without any demand of a plea. *Palk* v. *Randle*, 8 *T. R.* 465.

6. *Aliter* where the defendant enters an appearance, though he does not take the declaration out of the office. *White* v. *Dent*, 1 *Boſ. & Pull.* 341.

7. Not guilty pleaded to an action of debt on a penal ſtatute is not ſuch a nullity as warrants judgment to be ſigned for want of a plea. *Coppin q. t.* v. *Carter*, 1 *T. R.* 46.

8. Where the defendant is joined with his wife in the writ, he may enter an appearance for himſelf only, and in ſuch caſe the plaintiff cannot ſign judgment for want of a plea, without demanding a plea. *Clark* v. *Norris & Ux.*, 1 *H. B.* 235.

9. If defendant, after craving *oyer* of a deed, do not ſet forth the *whole* deed, the plaintiff may ſign judgment as for want of a plea, or the Court will quaſh the plea. *Wallace* v. *The Dutcheſs of Cumberland*, 4 *T. R.* 370.

10. The defendant having ſurrendered in diſcharge of his bail in *K. B.* removed himſelf by *habeas corpus* into the *Fleet*, and plaintiff declared againſt him there after the end of the ſecond term after the writ was returnable, a judgment of *non pros* ſigned afterwards was irregular. *Sherſon* v. *Hughes*, 5 *T. R.* 35.

11. In general a priſoner need not give notice of his having filed a plea; but when he pleads at an earlier time than by the rules of the court he is compellable to plead, he muſt give notice, and if he do not, the plaintiff may ſign judgment as for want of a plea. *Ruſholm* v. *Chapman*, 5 *T. R.* 473. *Parkinſon* v. *Thomſon*, 8 *T. R.* 596.

12. When the defendant pleads a plea not adapted to the nature of the action, as *nil debet* in *aſſumpſit*, &c. the plaintiff may conſider it as a nullity, and ſign judgment. *Barnes*, 257.

24 Vin. 631. (D. a. 3) Set aſide for Irregularity in ſigning it. *Not paying for the Iſſue*, &c.

ON the delivery of the iſſue, or returning the paper book, the defendant was formerly obliged to pay for copies of the pleadings, except in actions by a pauper, or againſt an attorney, or priſoner; and in a *qui tam* action he paid double. This was called iſſue-money, on non-payment of which the plaintiff might have ſigned judgment. But by a late rule of court no judgment ſhall be ſigned for non-payment of iſſue-money, but the ſame ſhall remain to be taxed, as part of the coſts in the cauſe. *R. H.* 35 *Geo.* 3. 6 *T. R.* 218. Which rule is conſtrued to extend not only to general iſſues, but alſo to all ſpecial iſſues, and the demurrer and paper books made up therein. 6 *T. R.* 477. *R. M.* 36 *G.* 3.

24 Vin. 633. (E. a) Set aſide for Irregularity in ſigning it. *Want of Notice of Writ or Declaration.*

PLAINTIFF having appeared for defendant purſuant to act of parliament, left a declaration in the office in *Eaſter* term, and in *Trinity* term gave notice thereof to defendant, and for want of plea ſigned judgment. Defendant applied to the court within *Trinity* term to ſet aſide the judgment, the nature of the action being

being omitted in the notice, and on hearing counſel on both ſides the judgment was ſet aſide. In *Michaelmas* term following plaintiff gave new notice of the declaration, and ſigned a ſecond judgment. The defendant applied again to the court to ſet that judgment aſide, inſiſting that the declaration was well delivered from the time of ſerving the ſecond notice only, and that the writ being returnable in *Eaſter* term laſt, the declaration was delivered too late, and the plaintiff muſt begin again; and the court were of that opinion, and ordered the ſecond judgment to be ſet aſide. *Barnes*, 291.

Jury.

[G]

See *Trial*.

(A. c. 2) Exempted from ſerving on Juries. Who are, and Remedy if returned.

21 Vin. 208.

IF the *inhabitants* of a diſtrict have enjoyed a preſcriptive right of *exemption* from ſerving on juries, they are not liable to ſerve under any of the *ſtatutes* relative to juries. *Rex* v. *Pugh*, 1 *Dougl.* 188.

(E. c) Challenge to the Array. Who may take it.

21 Vin. 216.

1. AFTER entering into the common rule for a ſpecial jury, if one of the parties ſtrike out hundredors, and at the trial challenge the array for want of hundredors, it is a contempt, and attachment ſhall iſſue. *Rex* v. *Burridge*, 1 *Str.* 593. *Ld. Raym.* 1364.

2. But if the defendant in an information obtain a rule for a ſpecial jury, the proſecutor takes the *venire* to the ſheriff, the defendant may challenge the array if the ſheriff has an intereſt in the cauſe, and it ſhall not be contempt. *Rex* v. *Johnſon*, 2 *Str.* 1090.

3. The party to whom the ſheriff is related cannot challenge the array for that reaſon. *Semb.* But if he do, and there is a demurrer *inſtanter* to that challenge, and before it is determined, the other party, for the ſake of expedition, move to quaſh the array, the court will do it without the conſent of the party challenging. *Kynaſton* v. *Mayor of Shrewſbury*, *Andr.* 85. 104.

4. In an action on a bye-law, that no perſon who is *not a freeman* could keep any ſhop or expoſe any goods to ſale by retail within the ſaid city, excepting at fairs, it is a good challenge that the ſheriff is a freeman. *Kerketh* v. *Braddock*, 3 *Burr.* 1847.

5. It is a good cauſe of challenge, if the jury is returned by an under-ſheriff who is attorney in the cauſe. *Baylis* v. *Lucas*, *Cowp.* 112.

21 Vin. 244. (Y. c) Challenge. What Perſons may be impannelled. (In reſpect of their Quality or Degree.)

1. A Knight need not be returned upon the panel in ejectment, on the demiſe of a peer. *Goodtitle* v. *Thruſtout*, 2 *Stra.* 1023.

2. By ſtat. 24 *G.* 2. *c.* 18. challenge to the panel for want of a knight, when a peer is party, is taken away.

3. By ſtat. 3 *G.* 2. *c.* 25. *ſ.* 19. the ſheriffs of the city of *London* for the time being ſhall not return any perſon to try any iſſue joined in *B. R.*, *C. B.*, or Exchequer, or to ſerve on any jury at the ſeſſions of *oyer and terminer*, gaol-delivery, or ſeſſions of the peace for the city of *London*, who ſhall not be a houſeholder within the city, and have lands, tenements, or perſonal eſtate to the value of 100*l.*, and the ſame matter being alleged as cauſe of challenge, and ſo found, ſhall be admitted as a principal challenge, and the perſon challenged ſhall be examined on oath on the truth of the ſaid matter.

4. And by *ſ.* 20. no perſon ſhall be returned to ſerve on a jury for the trial of a capital offence, not qualified to ſerve as a juror in civil cauſes.

21 Vin. 245. (Z. c. 2) Challenge. Freehold neceſſary or not, in what Caſes.

1. IF a juryman in treaſon, brought to the book, ſays he has no freehold in the county, he ſhall be ſworn upon a *voire dire* to that matter, and if he anſwer, he has none, he ſhall be ſet aſide. *Townley*'s caſe, 1746. *Foſter*, 7.

2. If a juryman has freehold and copyhold amounting to 10*l.* *per annum*, it is a good qualification, though the freehold alone is under 10*l.* *per annum*. *Ibid.*

3. So, by ſtat. 3 *G.* 3. *c.* 7., in *Middleſex*, leaſeholders having 50*l.* above ground rents or other reſervations, ſhall be obliged to ſerve on juries when ſummoned.

4. So, by ſtat. 3 *G.* 2. *c.* 25. *ſ.* 18., any leaſeholder for the term of 500 years abſolute, or for any term determinable on life or lives, of the clear yearly value of 20*l.* *per annum* over and above the rent reſerved, is qualified to ſerve on juries.

(A. d. 3) Challenge (principal) or peremptory to the Jurors. What (is). 21 Vin. 252.

1. CHARLES *Ratcliffe* had been convicted of high treaſon; and, in *B. R.*, *Mich.* 20 *G.* 2., upon a collateral iſſue, that he was not the ſame perſon, a peremptory challenge was inſiſted on, *and refuſed by Ch. J.* Lee. 1 *Blac.* 4. 6. Vide *Foſter*, 42. *Johnſon*'s caſe, *ib.* 46. and *Harg. Co. Litt.* 157. *Note* 8.

2. *Any* degree, even the *ſmalleſt* degree, of intereſt in the queſtion depending, is a deciſive objection to a juror. *Per* Lord *Mansfield.* 3 *Burr.* 1856.

3. A juror may be challenged *propter delictum*, as for conviction of treaſon, felony, perjury, or conſpiracy; or if for ſome infamous offence, he has received judgment of the pillory, tumbrel, or the like, to be branded, whipped, or ſtigmatized; or if he be outlawed or excommunicated, or hath been attainted of falſe verdict, *premunire*, or forgery. A juror may himſelf be examined on his *voire dire*, with regard to ſuch cauſes of challenge as are not to his diſhonour or diſcredit, but not with regard to any crime, or any thing which tends to his diſgrace or diſadvantage.

4. In an action by a corporation, it is a principal challenge to a juror that he is akin to a member of the corporation. 1 *Saund.* 344.

(A. d. 4) Challenge peremptory in Criminal Caſes. How many. 21 Vin. 253.

1. SOME ſtatutes, which take away the benefit of clergy from felons, exclude thoſe from their clergy who peremptorily challenge more than twenty, whereby they are liable to judgment of death. See ſtats. 22 *H.* 8. *c.* 14. 28 *H.* 8. *c.* 1. 1 *Ed.* 6. *c.* 12. *ſ.* 11. 3 & 4 *W.* & *M. c.* 9. But it is now ſettled that if the offender be within the benefit of clergy, the challenge ſhall be over-ruled, and the party put upon his trial. 2 *Hawk. P. C.* 43.

2. If a ſheriff return a jury to try an indictment in which he is proſecutor, it is good cauſe to challenge the jury. *Sheppard*'s caſe, *Caſ. in Cr. Law*, 119.

3. On iſſue joined on the replication of *nul tiel record* to a counterplea of felony, the priſoner may challenge any of the jurors before they are ſworn. *Caſ. in Cr. Law*, 450.

4. It hath been allowed a good cauſe of challenge, on the part of the priſoner, that the juror hath declared his opinion beforehand, that the party is guilty, or will be hanged, or the like. 2 *Hawk. P. C.* 418.

[D]
15 Vin. 2.

Justices.

BY ſtat. 1 *Geo.* 3. *c.* 23. judges commiſſioners continue during good behaviour, notwithſtanding the demiſe of the king; but they may be removed on addreſs of both houſes of parliament; and their ſalaries ſhall be paid as long as their commiſſions continue; and, on the demiſe of the crown, they ſhall be paid out of the duties granted for the civil liſt till further proviſion, and then out of the monies applicable to ſuch uſes.

15 Vin. 13.

(F) Of the Warrants, and the Form, &c. of them. In general.

1. IN the caſe of an act of parliament, it is ſaid that if the act directeth that a juſtice ſhall grant a warrant, and doth not ſay to whom it ſhall be directed, by conſequence of law, it muſt be directed to the conſtable; and it cannot be directed to the ſheriff, unleſs ſuch power is given in the act. 2 *Ld. Raym.* 1192.

2. A warrant under the hand of the juſtice is ſufficient, without being under ſeal, unleſs particularly required by act of parliament. *Bull. Ni. Pri.* 83.

3. A warrant to apprehend *all perſons* guilty of a crime therein ſpecified, will not juſtify the officer who acts under it. 3 *Hawk. P. C.*, *b.* 2. *c.* 13. *p.* 177.

4. In *November* 1762, the Earl of *Halifax*, Secretary of State, iſſued a warrant "to ſearch for *John Entick*, the author, or one "concerned in writing the *Monitor*." The meſſenger ſeized Mr. *Entick* and his papers. On treſpaſs, the jurors found a ſpecial verdict, and in *Mich.* 6 *G.* 3. Lord *Camden* delivered the judgment of the court, That a warrant to ſeize and carry away *papers* in the caſe of a ſeditious libel, is illegal and void. His Lordſhip ſaid, that warrants to ſearch for ſtolen goods had crept into the law by imperceptible practice; that it is the only caſe of the kind to be met with, and that the law proceeds in it with great caution. For, 1ſt, there muſt be a full charge upon oath of the theft committed; 2d, the owner muſt ſwear that the goods are lodged in ſuch a place; 3d, he muſt attend at the execution of the warrant, to ſhew them to the officer, who muſt ſee that they anſwer the deſcription. And, laſtly, the owner muſt abide the event at his peril; for if the goods are not found, *he* is a treſpaſſer, and the officer, being an innocent perſon, will be always a ready and convenient witneſs againſt him. 11 *State Trials*, 321. Vide alſo 2 *Hale*, 113. 151.

(G) Warrants executed, how. 15 Vin. 14.

1. BLATCHER v. *Kemp*, *Maidſtone* Summer Aſſizes 1781. This was an action of treſpaſs for entering the plaintiff's houſe. The defendant had acted under a warrant from a juſtice of peace to ſearch for nets; the warrant, on being produced, was directed to "The conſtable of *Shipborne*, to *Samuel Carter*, and "to all other officers of the peace in the county of *Kent*." Evidence was given that the defendant was borſholder of the hundred of *Little Peckham*, which adjoined to the hundred of *Shipborne*, in which the plaintiff's houſe was ſituated. *Per* Lord *Mansfield*. No conſtable can execute a warrant out of his diſtrict; it is certainly to be taken *reddendo ſingula ſingulis*. This warrant is directed "To the conſtable of *Shipborne*, to *Samuel* "*Carter*, and to all other peace officers:" the defendant is neither conſtable of *Shipborne*, nor *Samuel Carter*, and the general direction is to be taken to each within his diſtrict. Therefore, as the warrant was not directed to the defendant, he cannot juſtify under it, and the plaintiff muſt have a verdict for 1*s*. Vide 1 *H. Bl.* 15. (*notis.*)

2. A warrant properly penned (even though the magiſtrate who iſſues it ſhould exceed his juriſdiction) will, by 24 *G.* 2. *c.* 44., at all events, indemnify the officer who executes it miniſterially.

3. The perſon to whom a warrant is directed, if it be within the juriſdiction of the juſtice granting it, may lawfully execute it. 3 *Hawk. p.* 176. *ſ.* 11.

4. A bailiff or conſtable, if they be ſworn and commonly known to be officers, and act within their own precinct, need not ſhew their warrant to the party, notwithſtanding he demand the ſight of it; but theſe, and all other perſons whatſoever, making an arreſt, ought to acquaint the party with the ſubſtance of their warrants; and all private perſons to whom ſuch warrants ſhall be directed, and even officers, if they be not ſworn and commonly known, and even theſe, if they act out of their own precincts, muſt ſhew their warrants, if demanded. And therefore it is enacted by 27 *G.* 2. *c.* 20. that in all caſes where any juſtice of the peace is required or empowered by any ſtatute to iſſue a warrant of diſtreſs for the levying any penalty inflicted, or ſum of money thereby directed to be paid, "the officer executing ſuch warrant, if required, ſhall ſhew the ſame to the perſons whoſe goods and chattels are diſtrained, and ſhall ſuffer a copy thereof to be taken." *Vide* alſo 24 Geo. 2. c. 44.

5. The execution of a warrant muſt be purſuant to the directions of it. Therefore, where a warrant was directed to the officer, "to take up a diſorderly woman," and he took up a woman who was not ſo, the arreſt was held to be illegal, and the officer liable to an

action for the injury. *Dawſon* v. *Clarke*, *Norwich* Summer Aſſizes 1761, cited 3 *Hawk.* 182.

6. So alſo, where a warrant was directed by a ſecretary of ſtate to the king's meſſengers "to take up the author, printer, or publiſher of a libel," and the meſſengers took up a perſon who was neither author, printer, nor publiſher, it was determined to be unjuſtifiable, and the meſſengers liable to an action of falſe impriſonment; for in neither of the caſes had the officers acted in obedience to their warrants. *Money* v. *Leach*, 8 *Nov.* 1765. 11 *State Trials*, 312.

15 Vin. 15.

(H) Of their taking Bail.

1. BY 1 & 2 *Ph: & M. c.* 13., juſtices of peace ſhall not admit to bail perſons forbidden to be replevied or bailed by *Stat. Weſtm. the firſt*, *c.* 15., on pain of being fined by the judge of aſſizes.

2. *Rex* v. *Clarke* Eſq. He, as juſtice of peace, committed a man on ſuſpicion of ſtealing a mare, and bound over the owner to proſecute. Afterwards, upon examining two other perſons, he admitted the party to bail. The proſecutor appeared at the aſſizes, and found a bill; but the party accuſed did not appear. And the court granted an information againſt the juſtice, declaring they ſhould not have bailed the man themſelves. 2 *Stra.* 1216.

3. A commitment by a juſtice of peace for a time certain, as for 14 days, under the vagrant act, is a commitment in execution, and the party is not entitled to be bailed: and if another magiſtrate, on illegal and corrupt motives, diſcharge a perſon ſo committed, the court will grant an information againſt him. *R.* v. *Brooke*, 2 *T. R.* 190.

4. If a juſtice of peace *denies*, refuſes, or *obſtructs bail*, where it ought to be granted; for ſuch conduct he is liable to an action on the caſe. 2 *Hawk. P. C.* 90. *Hale P. C.* 97.

15 Vin. 17.

(L) Puniſhable. In what Caſes.

1. WHEREVER magiſtrates act uprightly, though they may miſtake the law, no information will be granted againſt them. *Per cur.* *Rex* v. *Jackſon*, 1 *T. R.* 653.

2. But if they act improperly knowingly, information ſhall be granted; as in the caſe of *R.* v. *Holland and another*, 27 *G.* 3. 1 *T. R.* 692. and *R.* v. *Filewood and another*, *E.* 26 *G.* 3.; where, for granting an ale licence, previouſly refuſed by other juſtices, upon good grounds, informations were granted.

3. By 24 *G.* 2. *c.* 44. *ſ.* 1. it is enacted, that no action ſhall be brought againſt, or any proceſs ſerved on, any juſtice for any thing done in the execution of his office, until a month's previous notice has been given.

See *Lovelace* v. *Curry*, 7 T.R. 631. and *Briggs* v. *Evelyn*, 2 H.Bl. 314.

4. And

4. And unleſs it is proved upon the trial that ſuch notice was given, the juſtice ſhall have a verdict and coſts. *Sect.* 3.

5. And the juſtice may, at any time within one month after ſuch notice, tender amends to the party complaining, or to his attorney; and if the ſame is not accepted, he may plead ſuch tender in bar to the action, together with the plea of not guilty, and any other plea with leave of the court; and if upon iſſue joined the jury ſhall find the amends tendered to have been ſufficient, they ſhall give a verdict for the defendant. *Sect.* 2.

6. And if he neglect to tender amends he may, by leave of the court, before iſſue joined, pay into court ſuch ſum as he ſhall ſee fit, whereupon ſuch proceeding and judgment ſhall be had, as in other actions where the defendant is allowed to pay money into court. *Sect.* 4.

7. And no action ſhall be brought againſt any juſtice for any thing done in the execution of his office, unleſs commenced within ſix months after the act committed. *Sect.* 8.

8. Where the plaintiff in ſuch action againſt a juſtice ſhall obtain a verdict, and the judge ſhall, in open court, certify on the back of the record that the injury for which ſuch action was brought was wilfully and maliciouſly committed, the plaintiff ſhall have double coſts. *Sect.* 7.

9. If a juſtice will not, on complaint to him made, execute his office, or ſhall miſbehave in his office, the party grieved may move the court of King's Bench for an information, and afterwards may apply to the court of Chancery to put him out of the commiſſion. *Ex parte Rock*, 2 *Atk.* 2.

10. But the moſt uſual way of compelling them to execute their office in any caſe is by writ of *Mandamus* out of the King's Bench.

11. In actions brought againſt juſtices (for miſdemeanor in the execution of their office) they are obliged to ſhew the regularity of their convictions; and the informations laid before them, upon which their convictions are grounded, muſt be produced and proved in court. 1 *Seſſ. Caſ.* 372. *Hill* v. *Bateman*, 12 *G.* 1.

12. An information was moved for againſt the defendant for aſſaulting and beating the mayor of *Yarmouth*, being a juſtice of the peace, in the execution of his office. On ſhewing cauſe, the queſtion was, whether the defendant could juſtify, the mayor having ſtruck him firſt? By Lord *Hardwicke* C. J. He may juſtify it; for though a magiſtrate is protected by the law whilſt he is in the execution of his office, yet in this inſtance he has forfeited that protection by beginning a breach of the peace himſelf. *Rex* v. *Symonds*, *Caſ. temp. Hardw.* 240.

[G]

Juſtification.

25 Vin. 31.

(A) Who may juſtify the detaining of a Thing, till Satisfaction.

1. A Perſon may juſtify detaining goods, or any things of value, 1ſt, where there is an expreſs contract to that effect; and, 2d, where it is implied, either from the uſage of trade, or the manner of dealing between the parties. 4 *Burr.* 2221.

2. As, a factor may detain goods conſigned to him, not merely for what is due for thoſe goods, but for the balance of a general account. *Krutzer* v. *Wilcox*, 2 *Burr.* 936.

3. In the caſe of *manufacturers*, their right to detain goods entruſted to them to manufacture, extends only *to the work done by them to the goods*, unleſs an expreſs uſage of trade is proved to the contrary. *Eſp. N. P. Caſ.* 96. 109.

4. A cuſtomer lodges bills of exchange in the hands of his banker generally, and when the banker advances money to him, he applies it to the diſcount of ſuch of the bills as happen to be neareſt in value to the ſum advanced, but without any ſpecial agreement to that effect. This does invalidate the banker's general right to retain all the other bills in his hands, in order to ſecure his general balance. *Davis* v. *Bouſher*, 34 *G.* 3. 5 *T. R.* 488.

5. An agreement entered into by a number of dyers, preſſers, *&c.* at a public meeting, that they would not receive any more goods to be dyed but on condition that they ſhould reſpectively have power to detain thoſe goods for their general balance, is good in law; and any one who, after notice of it, delivers goods to either of theſe perſons, muſt be conſidered as having aſſented to thoſe terms, and cannot demand his goods until he has paid the balance of his general account. *Kirkman* v. *Shawcroſs*, *M.* 35 *G.* 3. 6 *T. R.* 14.

6. A dyer (not acting as a factor, but merely as a manufacturer) cannot juſtify detaining goods delivered to him to dye, for other debts, but for the dying thoſe goods only. *Green* v. *Farmer*, 4 *Burr.* 2214. A packer, being in the nature of a factor, may. *Ib.*

See further on this ſubject the doctrine of *Lien*, as laid down in the different caſes collected in *Com. Dig.* 4. tit. *Merchant*; and 2 *Eſp. N. P.* 582. *et ſeq.*

Land.

(A) *Where* Land ſhall be *taken as Money*, or *Money as Land.* 15 Vin. 31.

1. MONEY to be laid out in land is uniformly treated as land. 1 *Atk.* 11. 1749. *Collett* v. *Collett.*

2. Where a ſum of money is given by the will of a teſtator to be laid out in the purchaſe of lands, or of lands in a particular county, and, after they are bought, to be ſettled on ſuch and ſuch perſons: if a bill be brought, the conſtant courſe is to direct a purchaſe, and the produce of the money to go as the land itſelf, till purchaſed. 2 *Atk.* 369. *July* 1742. *Earl of Coventry* v. *Coventry.*—See alſo *Oldham* v. *Hughes*, 2 *Atk.* 452. and *Beehm* v. *Trafford*, 3 *Atk.* 440. 447.

3. So, if there were directions in a will to purchaſe a particular eſtate, which is ſwallowed up by an inundation (as happened in *Eſſex*), the money ſo deviſed ſhall not go to the executor, but in ſuch manner as the rents and profits of the eſtate directed to be purchaſed would go. *Ibid.*

4. A proviſo in a ſettlement that 1000*l.* *ſhall* and *may* be laid out by the truſtees in the purchaſe of lands. The court was of opinion, that where there is a power to lay out money in land under ſome *particular* circumſtances, but the original intention was it ſhould be conſidered as money, if it be not actually veſted in land, it ſhall not be conſidered as land and go to the heir. 3 *Atk.* 212. *Stamper* v. *Miller.* *Feb.* 1744.

5. Upon a marriage between *Richard Bramble* and *Mary Timbrell*, the ſaid *Richard Bramble*, by articles previous to his marriage, covenanted to lay out 2000*l.* in the purchaſe of lands, and to ſettle the ſame on himſelf for life, and after his deceaſe, to *Mary* his intended wife for life; and after both their deceaſes, to truſtees to ſell, and the money ariſing by ſuch ſale to divide amongſt the children of the marriage, to ſons at 21, daughters at 21 or marriage, *provided that no ſale be made till one of the ſhares become payable.* The purchaſe was made accordingly, after *Elizabeth*, the ſurviving child, died unmarried, but had attained the age of 21; the abſolute proprietor of theſe lands, *Elizabeth*, having taken them as lands in her lifetime, and done acts to ſhew ſhe intended they ſhould be conſidered as real eſtates, they muſt be held as ſuch, and go to the heir. 3 *Atk.* 680. *March* 1747. *Crabtree* v. *Bramble.*

6. Money, by marriage articles to be laid out in land, to the uſe of the huſband and wife for life, then to the children as they ſhould

ſhould appoint: in default of appointment, equally; if but one, to that one in tail, reverſion to the huſband in fee. There was but one daughter of the marriage; the truſtee pays it to her and her huſband; ſhe not being *ſui juris*, nor ſeparately examined: the payment was not ſufficient to make it conſidered as money, and the ſiſter of the half blood may claim the reverſion in fee from the father; but the huſband of the other ſiſter, who was tenant in tail, will be tenant by the curteſy. 1 *Veſ.* 174. 1748. *Cunningham* v. *Moody*.

7. Teſtator gave all his real eſtates, to ſell and diſpoſe of the whole, with his perſonal eſtate, blending them for payment of debts, *&c.* He gave ſeveral legacies, amongſt which was a legacy of 1200*l.* part whereof was to be laid out in the purchaſe of freehold lands for charitable uſes. Lord *Hardwicke* held that the 1200*l.* was perſonal eſtate. 1 *Veſ.* 321. 1749. *Durour* v. *Motteux*.

8. Where the guardian of an infant, tenant in tail, cuts down timber, the money ariſing from it ſhall be perſonal eſtate of the infant; but if the infant had the fee, it ſhall be conſidered as real eſtate. *Amb.* 370. 1759. *Tullit* v. *Tullit*.

9. An infant entitled in remainder, under a reference to the Maſter, and order of court, purchaſes her mother's jointure, and, having attained 21, receives one year's rent, and dies; held the purchaſe was to be conſidered as real eſtate, though made during infancy. *Amb.* 417. 1762. *Inwood* v. *Twyne*.

10. *W. W.* conveyed eſtates in fee to truſtees, to ſell, pay debts, *&c.*, and afterwards to apply the reſidue as follows: To raiſe a ſum, and pay intereſt to *D.* till marriage, and pay the principal to *D.* within 12 months after marriage, then to divide the reſidue in ſhares amongſt the plaintiffs. By will he gave out of other lands a charge for another daughter, the reſidue to the plaintiffs. *D.* died unmarried; the 1500*l.* reſulted to the ſettlor as a reſulting truſt, but in his hands was perſonal eſtate, and paſſed as part of the reſidue. 1 *Bro. Ch. Rep.* 86. 1780. *Hewitt* v. *Wright*.

11. Money bequeathed to be laid out in land, the truſtee, being entitled to the money, lays part of it out in a purchaſe, but afterwards diſcharges that eſtate of the truſt; and, making his will, gives generally (without taking notice of his money) his real and perſonal eſtate to *A.*, who afterwards makes his will, and gives his real eſtate to *B.*, and his perſonal eſtate to *C.* The truſt-money paſſes as perſonal eſtate, the court being of opinion, under the circumſtances, that the money continued money. 1 *Bro. Ch. Rep.* 224. 1778. *Sir Wm. Pultney and others* v. *Earl of Darlington*.

12. Where a real eſtate is ordered to be ſold, and is blended with the perſonal property, it becomes perſonalty, and ſhall go accordingly. 1 *Bro.* 497. 1779. *Fletcher* v. *Aſhburner*.

13. Teſtator gave ſeveral legacies, and ordered his real and perſonal eſtate to be ſold, his debts and legacies paid, and the reſidue to certain legatees, in the proportion of their legacies; two of the

the reſiduary legatees died, living the teſtator. Theſe ſhares are lapſed, and ſo far as they are conſtituted of perſonal eſtate, ſhall go to the perſon next of kin; and ſo far as they are conſtituted of the real eſtate, to the heir at law. 1 *Bro.* 503. 1779. *Ackroyd* v. *Smithſon.*

Mr. Ogle made his will in 1744, and gave his real eſtate to truſtees to ſell, and veſt the money in ſtock, and pay the intereſt to his wife during her widowhood, and after her death or marriage, the principal to his two daughters equally, except that the eldeſt was to have 1000l. more than the other: he gave the reſidue of his perſonal eſtate in the ſame way; and afterwards executed a conveyance in truſt to ſell for the payment of his debts, which was held a revocation pro tanto only, and part was ſold. One of the daughters died in Mr. Ogle's *life. The court decreed the reſidue of the eſtate to be ſold, and that the produce ſhould be conſidered as Mr.* Ogle's *perſonal eſtate. Cited* 1 Bro. 514. Ogle v. Cook. 1748.—*Deviſe of real and perſonal eſtate to truſtees, in truſt out of the perſonal eſtate, and by ſale of a ſufficient part of the real to pay debts; the ſurplus, after payment of debts, to A. A ſuit was inſtituted for the payment of debts, and the real eſtates decreed to be ſold: part was ſold: and afterwards A. died, leaving a ſon and daughter; the cauſe was revived againſt the ſon, and it being apprehended that ſufficient was not ſold to pay the debts, a further part of the real eſtate was ſold under the order of the court. It afterwards appeared that the money produced by the firſt ſale was ſufficient to pay the debts.—Queſtion, whether the heir or perſonal repreſentative ſhould have this money? Lord* Camden *Chan. decided in favour of the next of kin.* Flanagan v. Flanagan, 1768. *cited* 1 Bro. 498. Fletcher v. Aſhburner.

14. Where money is directed to be laid out in land, *an infant* cannot elect to take it as money. 2 *Bro. Ch. Rep.* 56. 1786. *Carr* v. *Elliſon.*—See *Earlom* v. *Saunders, Amb.* 242.

15. Teſtator directs the reſt and reſidue of his real and perſonal eſtates to be ſold by truſtees, and to pay annuities; and then to pay the produce to *A.* for life. One of the truſtees (who are executors) has a legacy. This does not give them a beneficial intereſt: and ſo much of the reſidue as ariſes from the real, is a reſulting truſt for the heir, the reſt for the next of kin. 2 *Bro. Ch. Rep.* 589. 1789. *Robinſon* v. *Taylor.*

16. *Frances Hutcheſon* having an eſtate which came to her *ex parte maternâ*, on her marriage, conveyed the ſame to truſtees to ſuch uſes as ſhe ſhould direct, with remainder to her own right heirs: by will ſhe directed the eſtate to be ſold, the money to be laid out in the funds, and the truſtees to permit the huſband to receive the intereſt for life; then (after the deduction of 3500*l.* to uſes which veſted in the plaintiff *A. J.*, and after payment of 1000*l.* to *G. P.*) to pay the reſidue of the purchaſe-money to the three defendants *H.* By codicil ſhe gave the plaintiff, her huſband, a power of appointing 3500*l.* in caſe *A. J.* ſhould marry without his conſent. *G. P.* died, living the teſtatrix, before the codicil made; but *Frances Hutcheſon*, in the codicil, took no notice thereof. The 1000*l.* is real eſtate, and ſhall not go to the executors of *G. P.*, (though given to her executors,) nor to the perſonal repreſentative of the teſtatrix, nor yet to the reſiduary legatee of the purchaſe-money, but to the heir at law *ex parte maternâ*, the ſide from whence the eſtate came. 3 *Bro. Ch. Rep.* 128. *July* 1790. *Hutcheſon* v. *Hammond.*

17. Teſtator ordered his real eſtate to be ſold, and the reſidue to be laid out in the funds, to remain for 10 years, and at the end thereof gave the ſame to his next of kin; the next of kin at the time

time of the death would be entitled to take; and the teſtator having but one brother, who was ſuch next of kin, and who died within the 10 years, it is lapſed, and ſo much as was produced by the real eſtate reverts to the heir of teſtator, and ſo much as was produced by the perſonalties to the repreſentatives of the brother. 3 *Bro.* 353. 1791. *Spink* v. *Lewis and others.*

18. "After all my juſt debts are paid, I give and bequeath unto my only ſiſter, *Eleanor Dearn*, the annual produce of 2000 guineas, to be laid out in a piece of land, for a place of retirement, *to be for ever entailed on her iſſue*, the annual produce of ſuch purchaſe, to be yearly and equally divided among her iſſue, males and females, for the education, maintenance, and ſupport of them." The teſtator had no real eſtate at his death, and at the time of making his will *Eleanor Dearn* had three children, *Elizabeth*, who afterwards married the plaintiff, and the defendants, *Anna Maria, and Thomas*. *Eleanor* died, and *Elizabeth* married the plaintiff, and had one child, who ſoon after died; the lands were never purchaſed; bill by the huſband after his wife's death, inſiſting that the land, if purchaſed, ought to be ſettled on *Elizabeth Dearn* for her life, remainder to her ſons and daughters in tail, and that he having married one of the daughters and had iſſue, is entitled as tenant by the curteſy to her third; which was decreed accordingly. 3 *Bro. Ch. Rep.* 410. *Dec.* 1791. *Griffith* v. *Harriſon and others.*

19. Perſonal to be laid out in land, but lent on mortgage inſtead, conſidered as land, having been always out in truſtees, and the uſes never united with the poſſeſſion; and paſſed by ſuch general words in a will as would paſs lands. 1 *Veſ. jun.* 201. 1790. *Raſhley v. Maſters.*

20. Timber on a lunatic's eſtate, cut under order of court, ſold, and the produce paid into the Bank on account of the lunatic; after his death, on petition by his heir for the money, the Chancellor was of opinion, that the court may do it for the lunatic's benefit, but only on preſſing occaſions: that when property is converted, equity will recal it for the repreſentative, if done by breach of truſt, not if by accident, the court, or the tort of a ſtranger; but on account of its conſequences, and difficulty of reverſing an order made on petition, refuſed to give it either repreſentative, without a bill. 1 *Veſ. jun.* 453. 1792. *Ex parte Bromfield.*

21. There is no equity between the real and perſonal repreſentative after the death of a lunatic to have property, which was altered by the court, reſtored; therefore the produce of timber on the lunatic's eſtate, cut and ſold by order, on report that it would be for his benefit, is perſonal aſſets. 2 *Veſ.* 69. 1793. *Oxenden* v. *Lord Compton.*

22. A repreſentative muſt take his intereſt, as fortune has directed it, and has no equity to vary it; therefore, where a lunatic dies entitled to an eſtate, and alſo to a charge upon it, the heir takes it diſcharged, and a truſt term to ſecure a charge makes

no difference; for it remains inert, unleſs required to be executed for proper purpoſes. The truſtees have no diſcretion. *Ibid.* 261.

23. Teſtatrix directed her real eſtate to be ſold, and all her eſtate to be converted into money for the purpoſes of her will: the will was ſatisfied without touching the real; here is no equity for the next of kin. 2 *Veſ. jun.* 271. 1793. *Chitty* v. *Parker.*

24. Perſonal eſtate, under marriage articles, to be inveſted in land, or Government or other ſecurities; the court finding it in its original ſtate, conſiders it as perſonal; but part having been laid out in land, which was ſettled, and afterwards ſold, and the produce inveſted in ſtock, till a proper purchaſe of land could be found, to be ſettled to the ſame uſes, that was conſidered as land. 2 *Veſ. jun.* 336. *June* 1794. *Briſtowe* v. *Ward.*

25. Where land is directed to be ſold, and the produce to be applied as aftermentioned; if no diſpoſition be made, the heir ſhall take. *Per* Maſter of the Rolls. 2 *Veſ. jun.* 447. 1794. *Sheldon* v. *Barnes.*

26. *John Reeve* deviſed ſeveral real eſtates to *Wm. Collins* and his heirs, in truſt to ſell the ſame, and he declared that the monies to ariſe by ſuch ſale ſhould be conſidered as part of his perſonal eſtate, and thereout, and out of his perſonal eſtate, he gave legacies to his next of kin, and heir at law, and others. He gave other eſtates to be ſold, and the produce to be conſidered from thenceforth as other part of his perſonal eſtate, and to be diſpoſed of in manner following: He then gave legacies and ſome eſtates ſpecifically, and other legacies out of his ſaid truſt-monies and perſonal eſtate, and gave his executor 1000*l.* to be diſpoſed of according to any inſtructions he might leave in writing, and gave all the reſidue of his goods and chattels, perſonal eſtate and effects whatſoever, ſubject to debts, legacies, *&c.* No inſtructions being found, the heir is entitled to the 1000*l.* 2 *Veſ. jun.* 683. 1794. *Collins* v. *Wakeman.*

27. By ſettlement on marriage, reciting an intention to provide for the wife and children, certain tolls were granted for the remainder of the grantor's term, in truſt to raiſe an annuity for the lives of the wife and her mother, and the ſurvivor: then reciting, that the remainder of the term might expire in the life of the wife or her children; therefore, to make a proviſion for her and her children by her then or any future huſband, the truſtees ſhould be poſſeſſed of the ſaid tolls for the remainder of the term, upon truſt to raiſe, after the deaths of the grantor and the mother of the wife, annually 100*l.* to be placed out in the purchaſe of freehold lands or hereditaments, or leaſehold eſtates for two or three lives, as often as a competent ſum ſhould be raiſed for that purpoſe; and, until convenient purchaſes ſhould offer, to be inveſted in Government ſecurities upon truſt, in caſe the wife ſhould ſurvive the term, to pay the rents, iſſues, and profits or intereſt money towards the ſupport and maintenance of ſuch child and children of her, as ſhould be living at her death, till the youngeſt ſhould be 21; and then to be poſſeſſed of ſuch eſtates ſo to be purchaſed,

or

or of the money arising from the annuity, not placed out in one or more purchase or purchases, to the use of such child and children in such share and proportions, payable at 21, as the survivor of the husband and wife should by will or deed direct, limit, and appoint; in default thereof, to the use of all such children, equally to be divided, at their respective ages of 21; but if he should die without leaving any child or children, or all should die under 21, then to the use of the grantor, his heirs, executors, administrators, and assigns; and after paying the said annuities to be possessed of all the surplus money arising from the said tolls during the remainder of the term for the use of the grantor, his executors, &c. from the death of the grantor, who survived the wife's mother: The trustees received 100*l.* a-year, and laid out in stock the sums received and the produce. One son was the only issue. He attained 21 in the life of his mother, and survived her. The court would not invest the fund in land: but held it, with the accumulations from the death of the grantor, and the future payments, a vested interest in the son at 21, and as personal estate belonging to his administrator. 3 *Ves. jun.* 41. *Feb.* 1796. *Swann* v. *Fonnereau.*

28. A real estate devised to be sold, and the produce disposed of with the personal estate, with a power to direct the fund to be laid out in land; no such direction having been given, it was held personal property. 3 *Ves. jun.* 450. *July* 1797. *Maberly* v. *Strode.*

29. If an estate be declared charged with legacies, which fail, the devisee, and not the heir, shall have the benefit of it. 4 *Ves. jun.* 811. *July* 1799. *Rennell* v. *Abbott.*

30. There is no equity between the heir, or the devisee and the personal representative to convert property from the state in which it is found at the time when the death takes place. 5 *Ves. jun.* 303. 1800. *Attorney-General* v. *Bowyer.*

31. To convert real or personal property, from the state in which it is found at the death, as between the real and personal representatives, the character of land or money must, by the trust, covenant, &c. be imperatively and definitively affixed to it. 5 *Ves. jun.* 388. *May* 1800. *Whelpdale* v. *Partridge.*

15 Vin. 40.

(B) *Where Money* being *ordered to be laid out in Land*, and settled, Chancery will *decree the Payment*, or enforce the laying it out.

1. BY articles previous to the marriage of *A. G.* with the plaintiff, reciting her portion to be 2800*l.*, and that the defendant, as an advancement of his brother, &c. had agreed to pay 4000*l.* It was agreed to be laid out in the purchase of lands, or in some church, college, or other renewable lease, to be settled to the same uses as the freehold and leasehold estates, which *A. G.* was seised and possessed of, are appointed to be settled; the last limitation

limitation to *A. G.* and his heirs. 2800*l.* and 4000*l.* were never laid out in land, but remained in money to *A. G.*'s death. He, by will, deviſed all his freehold, leaſehold, and copyhold eſtates, lying in *Iſlington* and *Hampſhire*, or elſewhere, to the plaintiff for life, and after her death to the defendant and his heirs; and his perſonal eſtate, after paying his debts and legacies, he gave to the plaintiff, and made her and the defendant executors. The 2800*l.* and the 4000*l.* were ordered to be laid out in the purchaſe of lands of inheritance, or in church and leaſehold lands. The court being of opinion that if there had been only a general deviſe of his lands this money would certainly have paſſed. 3 *Atk.* 254. 1745. *Guidot* v. *Guidot.*

2. Teſtator contracts for a particular eſtate, but dies before the purchaſe is completed; afterwards, from the ſtate of his affairs, the contract was diſſolved; yet the purchaſe-money ſhall not ſink into his perſonal eſtate, but be laid out to the ſame uſes as he had deviſed the land contracted for. 4 *Bro. Ch. Rep.* 31. 1792. *Whittaker* v. *Whittaker.*

3. Teſtator directed money to be laid out in manors, lands, tenements, tithes, and hereditaments, or very long terms, with limitations applicable to real eſtates: the money not having been laid out, the crown, on failure of heirs, has no equity againſt the next of kin to have it laid out in real eſtate, in order to claim by eſcheat; the deviſees, on becoming abſolutely entitled, have the option given by the will: and a deed of appointment by one, who was a *feme covert*, was held ſufficient indication of her intention, that it ſhould continue perſonal againſt her heir claiming it as ineffectually diſpoſed of for want of her examination. 2 *Veſ. jun.* 170. 1793. *Walker* v. *Denne.*

4. Money bequeathed to *A.*, to remain at intereſt, or to be by him laid out in real eſtates, to go with other eſtates deviſed. *A.* being tenant in tail of the real eſtates, and being entitled under an aſſignment of the money from the reverſioner, ſubject to contingent limitations, diſpoſed of the money by will. The court inclined in favour of the diſpoſition, upon the ground that *A.* might have called for the money as abſolute owner; but it was eſtabliſhed upon the option to continue it perſonal eſtate. 3 *Veſ. jun.* 583. 1798. *Amler* v. *Amler.*

5. Teſtator deviſed a real eſtate to *A.* in tail male; remainder over; and gave a ſum of money in truſt to be laid out in land, to be ſettled to the ſame uſes: by codicil he deviſed the ſame real eſtates to *B.* and his heirs: and gave every thing he had given by his will to *A.* in as ample a manner to *B.* *B.* is tenant in fee of the real eſtate, and is entitled to have the money paid him. 4 *Veſ. jun.* 101. *July* 1798. *Younge* v. *Combe.*

[G]

Latitat.

15 Vin. 45.

(A) Latitat. What it is; and the Intent of it.

1. *LATITAT* is the true commencement of actions brought by bill of *Middlesex*, within the meaning of the statute of limitations. *Johnson and another, Assignees, &c.* v. *Smith.* 2 *Burr.* 950.

2. Though the *latitat* is holden to save the bar within the equity and reason of the statute, yet it must be taken out *with intent to declare in that action*, and must be *continued* to the filing of the bill. *Ib.* 961.

3. Where the true time of suing it out is material, it may be shewn, notwithstanding the *teste*. *Ib.* 950 to 969.

4. The *teste* of a *latitat* sued out in vacation must be of the preceding term. *Ib.* 964.

5. A *latitat* is a good commencement of a penal action, *ib.*; and may bear date *before* the cause of action, if really prosecuted after. *Ib.* 967.

6. By the general rule and course of the *King's Bench*, the *bill* is the *commencement* of *the suit*; and the *latitat*, except where it is replied to the statute of limitations, or to avoid a tender, or where it is given in evidence to support a penal action in point of time is considered but as *process*. *Foster* v. *Bonner*, 2 *Comp.* 454. Therefore the time of suing it out, except in the cases above mentioned, is *immaterial*. *Ib.*

7. But in these excepted cases, the time of suing out a *latitat* is material. As where, upon an action brought upon the stat. 8 *Geo.* 1. *c.* 19. (which directs all prosecutions upon it to be brought *before the end of the next term* after the offence committed) it was manifest upon the face of the declaration that it was out of time, the memorandum being of *Trinity* term, and the declaration stating that the defendant, after the first day of *Hilary* term, and before the exhibiting the plaintiff's bill, *viz.* on the 27th of *January*, kept a lurcher; yet, upon proof at the trial that the *latitat* was sued out within time, it was holden sufficient. *Ib.*

8. In all such cases the defendant is entitled, as well as the plaintiff, to shew the true time of the *latitat* issuing. *Ib.*

(A) Levant and Couchant. [G]

1. ANY cattle *levant and couchant* may be diſtrained for rent-ſervice, or a rent charge. *Kempe* v. *Crews*, 1 *Ld. Raym.* 167.

2. The cattle of a ſtranger *levant and couchant* thereon are iſſues of the land, and as ſuch may be ſold under a *levari facias*. *Britton* v. *Cole*, 1 *Comyns's Rep.* 52.

Lien.

(A) What is a Lien on the Lands. 15 Vin. 96.

1. A Huſband has a mortgage on his eſtate; the wife joins with him in charging her own; if ſhe ſurvives, her eſtate ſhall be looked upon only as a pledge, and ſhe is entitled to be ſatisfied out of his eſtate, as ſtanding in the mortgagee's place. 2 *Atk.* 384. 1742. *Porteriche* v. *Powlet.*

2. A decree is not equal to a judgment to affect lands, though it is in a courſe of adminiſtration. 1 *Veſ.* 496. 1750. *Aſſley* v. *Powis.*

3. *George Stephenſon* died inteſtate, leaving ſeveral co-heirs, of which the plaintiff was one; and a partition being afterwards made, an eſtate called *Bomſide*, and other lands, were allotted to the plaintiff, and by her direction conveyed to her and her ſon, *John Fawell*, their heirs and aſſigns. On the 29th *July* 1768, the plaintiff conveyed her intereſt to her ſon and his heirs, and took his bond for the conſideration-money. *John Fawell* afterwards became inſolvent, and in 1770, conveyed this and his other eſtates to certain perſons, in truſt for themſelves and his other creditors. The plaintiff having received 280*l.* only in part diſcharge of the bond, filed her bill againſt the aſſignees to be paid the remainder out of the money to ariſe by ſale of the eſtate; but the court was of opinion that the vendor having parted with his eſtate, and taken a ſecurity for the conſideration, had no lien upon the eſtate againſt the creditors of the purchaſer. *Amb.* 724. 14*th June* 1773. *Fawell* v. *Heelis and others. Dickins's Rep.* 485. S. C.

4. Where, upon a ſale of lands, bonds are taken for the purchaſe-money, which is not paid; *quære* whether the vendor has a lien on the lands? 1 *Bro. Ch. Rep.* 420. 1784. *Blackburn* v. *Gregson.*

5. *A.* purchaſes an eſtate of *B.*, without notice of rent-charges, *&c.* the vendor covenanting that there were no incumbrances: the purchaſe-money is laid out in the funds, and *B.* afterwards ſells the dividends for his life (ſecured by letter of attorney) to *C.* who has no notice. *A.* is evicted by the grantee of the rent-charge; he has no lien on the funds purchaſed, againſt *C.* 2 *Bro.* 282. 1787. *Cator* v. *Earl of Pembroke and others.* 1 *Bro.* 301. S C.

6. An aſſignment of rents and profits is an odd way of conveying; but it amounts to an equitable lien; and would entitle the aſſignee to come into equity and inſiſt upon a mortgage: an aſſignment of deeds alone is ſufficient for that purpoſe; and in this caſe there is a covenant for further aſſurance. 1 *Veſ. jun.* 161. 1790. *Ex parte Willis.*

7. In this caſe it was ſaid *per* Lord Chancellor, that an equitable lien was an equitable obligation to do according to conſcience, and that a deviſe of it is good in equity. 1 *Veſ. jun.* 251. 1790. *Perry* v. *Philips.*

8. An adminiſtratrix cannot be allowed payments made after a decree to account; but ſhe ſtands in the place of the creditors ſhe has paid. 2 *Veſ. jun.* 518. 1794. *Jones* v. *Jukes.*

9. The deviſee aliens; the land is not ſubject to the ſpecialty debts of the deviſor. 2 *Anſtr.* 506. 35 *G.* 3. *Matthews* v. *Jones.*

15 Vin. 98.

(B) What Agreement is a Lien on the Lands.

1. *M.* Agreed to purchaſe an eſtate of the plaintiffs for 1200*l.* *but died before he paid the whole of the purchaſe-money:* and by his will, after giving 800*l.* legacy to his ſiſter, deviſes the eſtate purchaſed, and all his perſonal eſtate, to *J. K.*, and makes him executor: *J. K.* commits a *devaſtavit* of the perſonal eſtate, and dies, and the perſonal eſtate deſcends on *B. K.* his ſon. The court, to give the legatee a chance of being paid her legacy out of the perſonal eſtate, directed the plaintiff to take his ſatisfaction out of the purchaſed eſtate for the remainder of the purchaſe-money. 3 *Atk.* 272. *Feb.* 1745. *Pollexfen* v. *Moore.*

2. Where a conveyance is made of land, and the money not paid, as againſt the vendee, his heir, or any claiming under him as purchaſer, with notice of the equity; the land may be reſorted to. Said *per* Lord Chancellor. 2 *Veſ.* 622. *July* 1755. *Walker* v. *Preſwick.*

3. A leaſe having been pledged by a perſon, (who afterwards became a bankrupt,) to the plaintiff as a ſecurity for a ſum of money lent to the bankrupt, the pledgee brought his bill for a ſale of the leaſehold eſtate, which was decreed. 1 *Bro. Ch. Rep.* 269. 1783. *Ruſſel* v. *Ruſſel.*

Per Lord Chancellor. Where there is an incomplete agreement for a mortgage, the court, after the death of the party, has given a ſpecific lien. 2 *Veſ. jun.* 582. *Burn* v. *Burn.* 1798.

Libel. [G]

(A) What is a Libel. 15 Vin. 84.

1. A Libellous letter addreſſed to the party himſelf, though it may be the object of an indictment, as tending to incite the plaintiff to a breach of the peace, is not actionable. To entitle the party to an action it muſt be addreſſed to a third perſon. 2 *Eſp. Rep.* 625.

2. It is not a libel for the editor of a public newſpaper to comment fairly on any place of public entertainment, or on any public performer. *Dibdin* v. *Swan*, 1 *Eſp. Rep.* 28. *Aliter* if done falſely and maliciouſly. *Ib.*

3. If a member of parliament publiſh his ſpeech in the newſpapers, and it contain charges of a ſlanderous nature againſt any individual, an information will lie againſt him for a libel. *Rex* v. *Lord Abingdon*, 1 *Eſp. Rep.* 226.

4. A paragraph in one newſpaper charging another with being vulgar or ſcurrilous, is not a libel. But if it aſſert of ſuch other newſpaper that it is low in circulation, as addreſſed to perſons who may be diſpoſed to advertiſe in it, it is a libel. *Heriot* v. *Stuart*, 1 *Eſp. Rep.* 437.

5. A report in a newſpaper of what paſſed in court in a cauſe, is not a libel. *Curry* v. *Walter*, 1 *Eſp. Rep.* 456.

6. An obſcene book is puniſhable as a libel. *Rex* v. *Curl*, 2 *Stra.* 789. 4 *Burr.* 2527.

7. To inſert a paragraph in a newſpaper of a tradeſman, tending to diſcredit him in his buſineſs, is a libel for which he may maintain an action. *Harman* v. *Delany*, 2 *Stra.* 898.

8. If the contents of a libel are true, the court will not grant an information, but will leave it to the ordinary courſe of juſtice before a grand jury. *Rex* v. *Bickerton*, 1 *Stra.* 498.

9. Though a libel tend to a breach of the peace, yet it is not an actual breach of the peace; and therefore a member of parliament writing a ſeditious libel, is entitled to his privilege from being arreſted for the ſame. *Rex* v. *Wilkes*, 2 *Wilſ.* 149.

As to when the proſecutor for a private libel muſt deny the charge made in it upon oath, to induce the court to grant an information, and when he need not, vide *Rex* v. *Miles*, Dougl. 284. *Rex* v. *Haſwell*, ib. 387. and the caſes there cited. *Rex* v. *Pearce*, ib. 390 n. *Rex* v. *Webſter*, 3 T. R. 388.

10. To print of any perſon that he is a *ſwindler*, is a libel and actionable. 1 *T. R.* 748.

11. Whatever tends to make a man ridiculous, or to hinder men from aſſociating with him, is a libel. *Villers* v. *Monſley*, 2 *Wilſ.* 403. *Rex* v. *Benfield*, 2 *Burr.* 980.

12. Though the perſon upon whom the libel is written be dead, it is ſtill a libel, and puniſhable as ſuch. *Rex* v. *Topham*, 4 *T. R.* 126.

15 Vin. 89.

(D) What is the diſtinct Power of the *Court*, and of the *Jury*, as to Libels.

1. UPON information for printing and publiſhing a ſeditious libel, the jury found the defendant guilty of *printing and publiſhing* ONLY; whereupon a *ven. fac. de novo* was ordered. *Rex* v. *Woodfall*, 5 *Burr.* 2661.

2. By 32 *Geo.* 3. *c.* 60. on the trial of an indictment for a libel, the *jury* may give a general verdict upon the whole matter in iſſue, and ſhall not be required by *the court* to find the defendant guilty, merely on proof of the publication, and of the ſenſe aſcribed to it in the information; but *the court* ſhall give their opinion and direction on the matter in iſſue, as in other criminal caſes; and *the jury* may find a ſpecial verdict; but defendants may move in arreſt of judgment, as before paſſing this act.

3. On the trial of an indictment for a libel, the only queſtions for the conſideration of *the jury* are the fact of the publiſhing, and the truth of the *innuendoes*. Whether the ſubject matter be or be not a libel is a queſtion of law for the conſideration of *the court*. *R.* v. *the Dean of St. Aſaph*, *M.* 25 *G.* 3. 3 *T. R.* 428. *n.*, and *R.* v. *Withers*, 3 *T. R.* 428. (But ſee ſtat. 32 *G.* 3. *c.* 60. above cited, and the opinion of *Kenyon* Ch. J. in *R.* v. *Holt*, 5 *T. R.* 436.

15 Vin. 90.

(E) Pleadings.

1. UPON an information for writing and publiſhing a libel, *of and concerning the king's government*, and *the employment of his troops*, (ſetting forth the libel *verbatim*), the words "*of and concerning*" are a ſufficient *introduction* of the *matter* contained in the libel, and a ſufficient *averment* that it was written "of and concerning the king's government and the employment of his troops." *Rex* v. *Horne*, 2 *Cowp.* 672.

2. The *giſt* of every *charge* of every libel, conſiſts in the *perſon* or *matter*, of and *concerning whom* or *which*, the words are averred to be ſaid or written. *Ib.*

3. All circumſtances neceſſary to conſtitute the crime muſt be ſet out. *Ib.*

4. Where the writing is ſo clear as to amount of itſelf to a libel, all foreign circumſtances introduced upon the record are unneceſſary. *Ib.*

5. Where

5. Where the libel does not in itſelf contain the crime without *extrinſic* aid, ſuch extrinſic matter muſt be put upon the record by *averments*. If *new* matter, by way of *introduction*; if matter of *explanation*, only by way of *innuendo*. *Ib.*

6. After verdict, in an action for a libel, the judgment was arreſted, becauſe it was not laid that the libel was of or *concerning* the plaintiff. *Lowfield* v. *Bancroft*, 2 *Stra.* 934.

7. The *publication* muſt be ſtated in the declaration; but it may be collected from the whole of it, and requires no technical form of words. 2 *Bl. Rep.* 1037.

8. In an action for a libel, written in a foreign language, the plaintiff muſt ſet forth the libel in the original; and if he only ſet out a tranſlation of it, the court will arreſt the judgment. *Zenobio* v. *Axtell*, 6 *T. R.* 162.

9. An indictment or information for a libel need not charge the offence to have been committed *vi et armis*, or allege that the libellous matter is falſe. *Rex* v. *Burks*, 7 *T. R.* 4.

10. An indictment for publiſhing libellous matter, reflecting on the memory of a dead perſon, not alleging that it was done with a deſign to bring contempt on the family of the deceaſed, to ſtir up the hatred of the king's ſubjects againſt them, cannot be ſupported. *Rex* v. *Topham*, 4 *T. R.* 126.

(F) Publication. What.

15 Vin. 91.

1. EVIDENCE of buying a *libel*, in the ſhop of a known common bookſeller and publiſher, (eſpecially when it imports to be printed *for* him) is ſufficient *prima facie* evidence (if believed, and not contradicted) to convict him of publiſhing it. *Rex* v. *Almon*, 5 *Burr.* 2687 to 2690.

2. Proof that the defendant gave a bond to the ſtamp-office for the duties on the advertiſements in a newſpaper, under the ſtat. 29 *G.* 3. *c.* 50. *ſ.* 10., and had occaſionally applied at the ſtamp-office reſpecting the duties, is evidence that he is a publiſher, *Rex* v. *Topham*, 4 *T. R.* 126.

Licence. [A]

(E) Countermandable.

15 Vin. 94.

IN general the ſame perſon who gives may revoke a licence; therefore where an incumbent is bound by deed to reſide, abſence by leave of the obligee ceaſes to excuſe when the licence is countermanded. It is like a general licence to enter another's grounds, which may be countermanded at any time. *Bagſhaw* v. *Boſley*, 4 *Term Rep.* 82.

[G] Limitation.

(A) Time of Limitation.

25 Vin. 99.

1. IN ejectment for mines, plaintiff proving himself lord of the manor, and in poſſeſſion of it, does not avoid the ſtatute of limitations, if the defendant has been in poſſeſſion of the mines 20 years; for they are diſtinct poſſeſſions, and may be different inheritances. *Rich* v. *Johnſon*, *M.* 14 *G.* 2. 2 *Stra.* 1142.

2. By the ſtat. 4 *Ann.* 16. no entry or claim ſhall be ſufficient unleſs an action be proſecuted within a year after.

3. To make length of poſſeſſion a bar under theſe ſtatutes, it muſt be a poſſeſſion adverſe to the title of the true owner, and not length of poſſeſſion during a particular eſtate. *Cowp.* 218.

4. Particular times of limitation are frequently appointed by ſtatute, different from thoſe in common caſes; as, in actions againſt juſtices of the peace, conſtables, headboroughs, &c. which, by 24 *Geo.* 2. *c.* 44. *ſ.* 8., muſt be commenced within *ſix* months; and in actions againſt officers of the exciſe or cuſtoms, &c. which, by 23 *Geo.* 3. *c.* 70. *ſ.* 34., muſt be commenced within *three* months after the act committed.

(B) Prevented as to real Actions. By what Acts.

25 Vin. 106.

1. THE poſſeſſion of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion; becauſe ſuch poſſeſſion is not adverſe to the right of his companion, but in ſupport of their common title; and by paying him his ſhare, he acknowledges him co-tenant; nor, indeed, is refuſal to pay of itſelf ſufficient, without denying his title. But if upon demand by the co-tenant of his moiety, the other refuſes to pay, and denies his title, ſaying, he claims the whole, and will not pay, and continues in poſſeſſion, ſuch poſſeſſion is adverſe and *ouſter* enough. And in the ſame caſe it was held, that a jury might preſume *actual* ouſter from an undiſturbed and quiet poſſeſſion for a great length of time, *ſſ.* 36 years. *Per* Lord *Manſfield*, in *Fiſher* v. *Proſſer*, *Cowp.* 218. Vide *Eſpinaſſe*, 456. 1 *Atk.* 493. 1 *Bl. Rep.* 677. 2 *ib.* 690.

2. Whether the lord's right of entry for a forfeiture be not barred after 20 years by the ſtatute of limitations, *Qu.* *Roe d. Tarrant* v. *Hellier*, 3 *T. R.* 172.

(C) Prevented as to perſonal Actions. By what Acts. 15 Vin. 106.

1. IN *aſſumpſit* on a promiſſory note, and *non aſſumpſit infra ſex annos* pleaded, on the trial it appeared that the defendant was ſurety in the note for *J. S.*, and that ſix years were elapſed ſince the note was given, but that upon demand within the ſix years, the defendant ſaid, "You know I had not any of the money my-"ſelf; but I am willing to pay half of it." The court were of opinion that this promiſe took it out of the ſtatute. *Buller's N. P.* 149.

2. In *aſſumpſit* on a *joint and ſeveral* promiſſory note, and the action was againſt one, who pleaded the ſtatute of limitations; payment of intereſt by another of the drawers was held a ſufficient acknowledgment to take it out of the ſtatute as to all, and the plaintiff recovered. *Whitcomb* v. *Whiting*, *Dougl.* 629.

3. Where a joint and ſeveral promiſſory note was given by two in the year 1784, and one became bankrupt, the *payee proved the note under his commiſſion and received ſeveral dividends*, the laſt of which was in *the year* 1793, a balance remaining unpaid, the preſent action was brought, and the defendant pleaded the ſtatute of limitations. It was held that the payment of the dividend under the commiſſion againſt one, took the debt out of the ſtatute of limitations. *Jackſon* v. *Fairbank*, 2 *H. Bl.* 340.

4. The ſlighteſt acknowledgment of a debt has been held ſufficient to take a demand out of the ſtatute; as to ſay, "Prove "your debt and I will pay you;" or, "I am ready to account, "but nothing is due to you." *Per* Lord *Mansfield*, *Cowp.* 548. *Yea* v. *Fouraker*, 2 *Burr.* 1099.

Qu. Whether this can be fairly interpreted to be an acknowledgment of a debt, *even in the ſlighteſt degree.*

5. Where to an action of *aſſumpſit*, and the ſtatute of limitations pleaded, the plaintiff proved, that juſt after the bill had been delivered, the defendant met the plaintiff and ſaid, "What an extravagant bill you have delivered to me." Lord *Kenyon* ruled this to be a ſufficient acknowledgment of ſome money being due. *Lawrence* v. *Worrall*, *Peake's N. P.* 93.

6. A *latitat* ſued out within ſix years ſhall be good to prevent the ſtatute from running, though no bill of *Middleſex* preceding it is ſhewn. So a *capias* is good without an original. *Holliſter* v. *Coulſon*, 1 *Stra.* 550. *Metcalf* v. *Burrows*, *Bull. N. P.* 151.

7. Though the writ ſued out has been *informal*, it ſhall yet be ſufficient. *Leadbetter* v. *Markland*, 2 *Bl. Rep.* 1131. But where the proceſs is impoſſible or a *nullity*, it ſhall not operate to take the demand out of the ſtatute. *Green* v. *Revell*, 2 *Salk.* 421.

8. If the plaintiff has levied a plaint in *aſſumpſit* in an inferior court, it ſhall prevent the ſtatute of limitations from attaching againſt him, if he aver in his replication above *that it is for the ſame cauſe of action*. *Story* v. *Atkyns*, 2 *Stra.* 719.

9. And

9. And if an action has been ſo commenced in an inferior court, and the defendant removes it by *habeas corpus* to the King's Bench; though the ſix years have elapſed before the removal, yet the ſtatute does not bar the action, if the commencement of it in the court below was within the time. *Gaiver* v. *James*. *Trin.* 14 *G.* 2. *C. B. Bull. N. P.* 151.

10. It is neceſſary that a ſuit ſhould be continued; for though a writ has been ſued out, *yet if there have been no proceedings on it for ſix years*, from the ſuing of it out to the time of declaring, the ſtatute ſhall operate. *Lacon* v. *Lacon*, 2 *Atk.* 395.

11. And the continuances muſt be by regular proceſs; for where to a plea of the ſtatute of limitations, the plaintiff replied that he had ſued out a bill of *Middleſex* in *Mich.* term 1785, which had been regularly continued to *Mich.* 1789, when *he ſued out an attachment of privilege* for the ſame cauſe of action, to which the defendant appeared: to this there was a demurrer, when it was decided, that to keep the ſuit alive there muſt be a continuance of the original writ ſued out; that here the firſt proceſs was by bill of *Middleſex*, of which an *attachment of privilege* (*being a writ of a different nature*) *could not be a continuance*. And the defendant had judgment. *Smith* v. *Bower*, 3 *T. R.* 662.

12. A bill depending in Chancery almoſt ſix years is not ſuch a demand as to take a debt out of the ſtatute of limitations. *Anon. H.* 1736. 2 *Atk.* 1.

13. One of two makers of a joint promiſſory note having become a bankrupt, the payee receives a dividend under the commiſſion on account of the note: this will prevent the other maker from availing himſelf of the ſtatute of limitations in an action brought againſt him for the remainder of the money due on the note; the dividend having been received within ſix years before the action brought. *Jackſon* v. *Fairbank*, 2 *H. Bl.* 340.

14. If there be a mutual account of any ſort between the plaintiff and defendant, for any item of which credit has been given within ſix years, that is evidence of there being ſuch an open account between the parties, and of a promiſe to pay the balance, ſo as to take the caſe out of the ſtatute of limitations. *Catling* v. *Skoulding*, 6 *T. R.* 189.

15 Vin. 107. ## (E) Extends to what Things, or Actions in general, touching the *Perſonalty*.

1. THE ſtatute of limitations runs againſt every demand ſo as to be a complete bar, notwithſtanding any meſne act intervening, as bankruptcy, *coverture*, &c. For where in *aſſumpſit* by the aſſignees of a bankrupt, and plea of *non-aſſumpſit infra ſex annos*, the plaintiff replied that ſix years were not elapſed *at the time of the aſſignment*. On demurrer the defendant had judgment; for though the ſix years might not have elapſed at the time of the aſſignment, yet as they were elapſed at *the time of bringing the action*, the ſtatute was a good bar. *Gray* v. *Mendez*, 1 *Stra.* 556.

2. The

2. The ſtatute of limitations runs alſo againſt *all bills of exchange, and promiſſory notes.* *Cheeveley* v. *Bond, Show.* 340.

3. The ſtatute of limitations extends not to debt reſerved by indenture; nor to debts on matters of record. But 20 years without any demand is of itſelf a preſumption that a bond has been paid. 1 *T. R.* 270.

(F. 2) Accounts between Merchants. 15 Vin. 109.

1. WHERE the plaintiff, to a plea of the ſtatute of limitations, replied a bill of *Middleſex*, and that the defendant promiſed to pay within the ſix years before the ſuing out of the writ, and it appeared that all the items in the bill whereon the demand aroſe, except the laſt, were above ſix years ſtanding before the bill of *Middleſex* ſued out; it was inſiſted for the plaintiff, that the laſt item being within ſix years, and this being an account current never liquidated, ſhould draw the former items out of the ſtatute; but it was held by Mr. *J. Deniſon* that the clauſe in the ſtatute of limitations about merchants' accounts extended only to caſes where there were *mutual* accounts, and *reciprocal* demands between two perſons; but if there were only a demand by *A.* againſt *B.* in the common way of buſineſs, as by a tradeſman on his cuſtomer, that cannot be called merchants' accounts; and he was clearly of opinion, that in that caſe the ſtatute was a bar to all demands of above ſix years ſtanding. *Cotes* v. *Harris, Bull. N. P.* 149, 150.

2. But where there are *accounts current between* parties, and credit given on both ſides, in ſuch caſe, if any *item* is within ſix years, it ſhall prevent the ſtatute from attaching. *Catling* v. *Skoulding*, 6 *T. R.* 189.

(H) Beyond Sea. Infants. Feme Covert. Perſons impriſoned. *Non compos.* 15 Vin. 111.

1. IT ſeems to have been the better opinion, that the exception in the ſtat. 21 *Jac.* 1. *c.* 16. in favour of perſons being beyond ſea, extends only to the caſe where the *creditors* or *plaintiffs* were ſo abſent, and not where the *debtors* or *defendants* were, becauſe creditors only are mentioned in the ſtatute. *Hall* v. *Wyborn*, 1 *Show.* 99. But now by 4 *Ann. c.* 16. *ſ.* 19. it is enacted, that if any perſon *againſt whom* any action lies for ſeamen's wages, treſpaſs, detinue, trover, replevin, action of account or upon the caſe, (or other actions mentioned in 21 *Jac.* 1. *c.* 16. *ſ.* 3.), was beyond ſea at the time that ſuch action accrued, the *plaintiff* ſhall be at liberty to bring his action againſt him within the ſame time after his return as is limited for ſuch action by ſtat. 21 *Jac.* 1. *ſ.* 16, and 4 *Ann. c.* 16.

2. If

2. If one plaintiff be abroad and the others in *England*, the action muſt be brought within ſix years after the cauſe of action ariſes. *Perry* v. *Jackſon*, 4 *T. R.* 516.

3. If the plaintiff be in *England* at the time the cauſe of action accrues, the time of limitation begins to run, ſo that if he, or his perſonal repreſentative, does not commence an action within ſix years, they are barred by the ſtatute. *Smith* v. *Hill*, 1 *Wilſ.* 134.

4. By 4 *Ann. c.* 6. *ſ.* 17, 18. it is enacted, that all ſuits and actions in the court of Admiralty for ſeamen's wages ſhall be commenced within ſix years next after the cauſe of ſuch ſuits or actions ſhall accrue, and not after, with a proviſo in favour of the plaintiff's infancy, coverture, impriſonment, or reſidence beyond the ſeas, at the time the cauſe of action accrued.

5. The clauſe as to *perſons beyond ſea* extends only to ſuch as are actually ſo. Therefore if a perſon be in *Scotland*, it is not ſufficient. *King* v. *Walker*, 1 *Bl. Rep.* 286.

6. The ſtatute of limitations can never begin to run againſt a plaintiff who is a foreigner until he comes into this realm. *Strithorſt* v. *Greame*, *Eſq. C. B.* 3 *Wilſ.* 145.

25 Vin. 124. (T) Equity. Relief, in what Caſes, againſt the Statute.

1. THE ſtatute of limitations does not extend to a truſt. *Com. Rep.* 709. 13 *G.* 2. *Skirme* v. *Merick and others*. Nor to accounts current.

2. The ſtatute of limitations was pleaded to a bill of diſcovery, but the plea was over-ruled. *Bunb.* 60. 1720. *Dean and Chapter of Weſtminſter* v. *Sir Thomas Croſs and others*.

3. Bill by a lay impropriator for tithes for about 24 years. The defendant, as to ſuch part of the bill as prays diſcovery and relief for any time within ſix years next before the filing of the bill or ſerving the *ſubpœna*, pleads the ſtatute of limitations, and that he did not promiſe to make any ſatisfaction for any tithes before the ſaid ſix years. The plea was over-ruled; for the defendant, as to the tithes, is in the nature of a receiver or bailiff for the plaintiff, in which caſe the ſtatute does not operate. *Bunb.* 213. 1726. *Marſton* v. *Cleypole and others*.

4. The ſtatute of limitations pleaded by one partner to a bill brought by another for the balance, and an account and ſatisfaction; and the plea was allowed. *Bunb.* 217. 1726. *Bridges* v. *Mitchell*.

5. The ſtatute of limitations cannot be pleaded to a bill which charges a *fraud* diſcovered within ſix years before the filing of the bill; and in this caſe it was held that the ſtatute of limitations was pleadable againſt the *South Sea* Company, in whom the eſtates of the late directors are veſted by act of parliament, in the ſame manner as it might have been pleaded againſt the late directors, the

the Company ſtanding in their place; as where the aſſignee of a bankrupt claims under the act of parliament: yet as the ſtatute of limitations might be pleaded againſt the bankrupt, it is pleadable againſt the aſſignee. 3 *P. Wms.* 143. *Mich.* 1732. *South Sea Company* v. *Wymondſell.*

6. To take a debt out of the ſtatute of limitations there muſt be a *direct admiſſion of a debt*, and in ſeveral caſes at law it has been held, that there muſt be *an expreſs promiſe to pay:* and though a truſt for payment of debts is held to revive ſuch debts as have been barred by the ſtatute of limitations, yet the judges have always been diſſatisfied. 3 *Atk.* 107. *July* 1744. *Lacon* v. *Briggs.* Vide alſo *Ouchterlony* v. *Earl Powis, Amb.* 231. *May* 1754.

7. Where a real eſtate is to be affected by a truſt to pay debts, plain and clear debts only are revived, and not ſuch as depend upon accounts to be taken. *Ib.*

8. An offer to account will take a caſe out of the ſtatute of limitations. 2 *Veſ.* 485. *July* 1752. *Earl Pomfret* v. *Lord Windſor.*

(U) *Equity. What Proceedings in* Equity are within it. 15 Vin. 125.

1. THE ſtatute of limitations is a bar in equity as well as at law. *Com. Rep.* 710. 13 *G.* 2. *Skirme* v. *Meyrick and others.*

2. It appeared in this caſe that the right of the plaintiff, and of thoſe under whom he claimed, had accrued near thirty years ſince, during all which time the defendant's poſſeſſion had been unmoleſted: the ſtatute of limitations was pleaded, and though it was urged that the plaintiff had not the leaſe in his poſſeſſion, and that the defendant in his plea had ſet forth that the leaſe had been renewed; and although it was alſo inſiſted, that however the plaintiff might be diſabled from bringing an ejectment, yet he might bring a bill in equity; the Chancellor refuſed to grant relief in the caſe of ſo ſtale a demand, and allowed the plea. 3 *P. Wms.* 263. *Eaſt.* 1734. *Low* v. *Burron.*

3. Length of time, which will not bar an ejectment, will not bar a bill in equity. 3 *P. Wms.* 287. *Trin.* 1734. *Cook* v. *Arnham.*

4. The ſtatute of limitations ſhall bind an infant where his truſtee neglected to ſue within ſix years, ſo where an executor or adminiſtrator neglects to ſue. 3 *P. Wms.* 309. *Trin.* 1734. *Wych* v. *Eaſt India Company.*

5. A corporation ſhall have the benefit of the ſtatute of limitations, as well as a private perſon. *Ib.*

6. A bill in chancery, which had been depending almoſt ſix years, is not to be conſidered a ſufficient demand of the debt to take it out of the ſtatute of limitations. 1 *Atk.* 282. *Hill.* 1736. *Lake* v. *Hoyes.* And 2 *Atk.* 1. *Hill.* 1736. *Anon.* S. P.

7. If

7. If the ſtatute of limitations be neither pleaded nor inſiſted on by anſwer, the defendant cannot have the benefit of ſuch bar to the plaintiff's demand. 1 *Atk.* 493. *Hill.* 1737. *Prince* v. *Heylin.*

8. Though a receiver be appointed by the court, yet that will not alter the poſſeſſion of the eſtate in the perſon, who ſhall be found entitled at the time the receiver was appointed, ſo as to prevent the ſtatute of limitations running during the right in diſpute. 2 *Atk.* 15. *Hil.* 1737. *Anon.*

9. *T. S.* deviſes all his real and perſonal eſtate to *G.*, his heirs, *&c.* charged with the payment of his debts; the plaintiffs, who are bond creditors, never aſked for their principal, but received their intereſt regularly of *G.*, the executor for 16 years, and *G.* during this time made ſeveral ſales of the teſtator's eſtates: the Maſter of the Rolls diſmiſſed the bill brought by the bond creditors againſt the purchaſers, whom he would not diſturb after a poſſeſſion of 16 years. 2 *Atk.* 41. *July* 1740. *Elliet and others* v. *Merriman.*

10. Where a judgment was outſtanding, and no ſatisfaction entered, the court of Chancery refuſed to decree it ſatisfied merely upon preſumption of length of time, the judgment being 42 years ſtanding, and eſpecially ſince the ſtatute for the amendment of the law 4 *Anne*, *c.* 16. *ſ.* 12. allows a plea of payment at law, as it is an old judgment. 2 *Atk.* 45. *July* 1740. *Kemys* v. *Ruſcomb.*

11. The ſtatute of limitations cannot be pleaded to the diſcovery when the debt was due, though it may be pleaded to the debt itſelf; becauſe, by the defendant's ſetting forth when the debt commenced, it will appear to the court, whether the ſix years are incurred according to the ſtatute. 2 *Atk.* 51. *July* 1740. *Mackworth* v. *Clifton.*

12. Where the enjoyment of an eſtate has been for 21 years, courts of law, as well as courts of equity, will make a ſtrong preſumption in favour of ſuch poſſeſſion, though there may be ſome circumſtances to ſhew that it was not the intention that the inheritance ſhould be conveyed. 2 *Atk.* 67. *Nov.* 1740. *Cooke* v. *Cooke.*

13. Lord *Lucas* by his will left to *Dorothy Potter* an annuity of 25*l.* for her life; ſhe dies in 1718; the plaintiff, the repreſentative of the annuitant, in 1740 brings his bill for the arrears of the annuity, from the year 1708 to the death of *Dorothy Potter*. The court, from the length of time, preſumed it to have been paid, and diſmiſſed the bill with coſts. 2 *Atk.* 71. 1740. *Smallman* v. *Lord Archibald Hamilton.*

14. Where no demand has been made on a bond for 20 years, the judges will direct a jury to find it ſatisfied. 2 *Atk.* 144. *March* 1740. *Gratwick* v. *Simpſon and Moore.*

15. Portions, which became due in 1673, were ſued for in 1717; ſuch a length of time creates a ſtrong preſumption that they are paid, and it almoſt amounts to proving a negative to induce the court to believe that they are ſtill unpaid. 2 *Atk.* 177. *April* 1741. *Sir Thomas Standiſh* v. *Madley.*

16. Length

16. Length of time pleaded in bar to a redemption of a mortgage which was made in 1713, the mortgagor's ſolicitor appearing to have ſettled an account in 1730 in order to pay off the mortgage, Lord *Hardwicke* held that would ſecure the right of redemption. 2 *Atk.* 333. *July* 1742. *Anon.*

17. Coverture is no excuſe for not redeeming a mortgage; for if a woman becomes afterwards diſcovert, the ſtatute of limitations will run from that time; neither is a tenancy by the curteſy any excuſe, for it is of no conſequence to a mortgagee who have the equity of redemption; if they do not make uſe of their right they ſhall be barred. *Ib.*

18. Though an original be filed at law, yet if there has not been any proceeding upon it for ſix years, it will not prevent the ſtatute of limitations from running. 2 *Atk.* 395. *Auguſt* 1742. *Lacon* v. *Lacon.*

19. Tranſactions with a foreign prince and his government do not concern the trade of merchandize, and perſons concerned in ſuch tranſactions are not within the exceptions in the ſtat. 21 *Jac.* 1. A letter of attorney from one merchant to another to get in debts, will not make the perſon ſo deputed a merchant within the ſtatute. 2 *Atk.* 610. *July* 1743. *Sturt* v. *Melliſh.* *The exception in the ſtatute as to merchants' accounts was to prevent dividing the account where running, and part within the time and part before. 2 Veſ. 400. Aug. 1751. Welford v. Liddel.*

20. A creditor by 4 *Ann. c.* 16. has the ſame privilege on the debtor's being beyond ſea, when the cauſe of action accrues, as he had by the ſtat. of *James*, on his being beyond ſea himſelf; and where a creditor, who has been out of the kingdom, returns, the time will run, and his going abroad again will give him no privilege, for that was gone by his having once returned after the cauſe of action accrued. *Ib.*

21. It has been ſaid that the ſtatute of limitations will not run againſt one joint-tenant or tenant in common, unleſs an actual ouſter is made; there muſt be ſome ouſter; but if after ſuch ouſter a tenant in common, or joint-tenant, continues in poſſeſſion of the whole for 20 years, it is a bar. 2 *Atk.* 632. *July* 1743. *Story* v. *Lord Windſor and others.*

22. An executor of a houſe ſteward to Lord *Bradford*, after an acquieſcence of 17 years, ſets up a demand for a large ſum due for buſineſs done by his teſtator, to which the repreſentative of Lord *Bradford* inſiſted on the ſtatute of limitations, which was allowed. 3 *Atk.* 105. *July* 1744. *Lacon* v. *Briggs.*

23. The ſtatute of limitations cannot be pleaded againſt a breach of truſt, nor can a perſon who has taken a conveyance from the truſtee ſhelter himſelf under a plea of that ſtatute. 3 *Atk.* 459. *March* 1746. *Boteler* v. *Collington.* *But the rule that a truſt is not within the ſtatute of limitations, applies only, between truſtee and *ceſtui que truſt*, and not againſt a truſt by implication, as affected by an equity. 1 Bro. Ch. Rep. 551. May 1783. Townſhend v. Townſhend.*

24. Where there has been no demand of principal or intereſt on a bond for twenty years, ſatisfaction of the debt will be preſumed,

ſumed, except in caſes of mortgage: the mortgagee is ſuppoſed to continue in poſſeſſion, and the mortgagor to be tenant at will to him. 1 *Veſ.* 51. *Nov.* 1747. *Leman* v. *Newnham.*

25. Where the owner of a rent charge ſuffered it to run in arrear for eight years, it is not to be preſumed abſolutely releaſed. 1 *Veſ.* 267. *July* 1749. *Aſton* v. *Aſton.*

26. Bill lies by the aſſignee of a bankrupt for delivery of goods pledged by the bankrupt, notwithſtanding the ſtatute of limitations. 1 *Veſ.* 278. *July* 1749. *Kemp* v. *Weſtbrook.*

A remainder-man expectant on an eſtate for life or years, to whom a right to enter or bring an ejectment is given by the forfeiture of the tenant for life or years, yet ſuch remainder-man is not bound to do ſo, and if he comes within his time after the remainder attached, it will be good; nor can the ſtatute of limitations be inſiſted on againſt him for not coming within twenty years after his title accrued by forfeiture. Ib.

27. Bill filed for a ſtrict ſettlement, after a long acquieſcence by the plaintiff's anceſtor, when it had become impoſſible to bar the remainder, and diſmiſſed. 1 *Veſ.* 530. *Auguſt* 1750. *Parker* v. *Phillips.*

28. Courts of equity diſcourage ſuits for old, ſtale accounts, but every caſe of this kind muſt ſtand upon its own circumſtances; and length of time does not in equity bar an adminiſtratix from calling for an execution of a truſt of real eſtate. 2 *Veſ.* 482. *July* 1752. *Earl Pomfret* v. *Lord Windſor.*

An offer to account will take a caſe out of the ſtatute of limitations. Ib.

29. Filing a bill for equitable relief is equivalent to the bringing an action at law as to preventing a fine being ſet up as a bar; but filing a bill for a diſcovery merely is not. But this decree was afterwards reverſed in *Dom. Proc.* 1 *Bro. Ch. Rep.* 289. *Trin.* 1783. *Pincke* v. *Thornycroft.*

30. Although non-payment of intereſt for twenty years on a mortgage, where clear, and no demand, raiſes a preſumption of payment; yet on doubtful circumſtances, and the original mortgage admitted, it was referred to the Maſter to inquire whether any intereſt had been paid. 3 *Bro. Ch. Rep.* 289. *July* 1791. *Traſh* v. *White.*

31. *Demurrer* to a bill charging fraud in miſrepreſenting the value of an eſtate to the vendor, on the ground that the tranſaction was 27 years old, and had been confirmed by a deed 23 years ſince, overruled, length of time being no ground for a demurrer. 3 *Bro. Ch. Rep.* 633. *Trin.* 1792. *Earl of Deloraine* v. *Browne.*

A bill of review will not lie after twenty years Amb. 645. May 1767. 3 Bro. Ch. Rep. 639. in notis, S. C. Though a bill of review cannot in general be brought to reverſe a decree after 20 years, this does not apply to perſons having contingent intereſts, and then not exiſting, or being under diſabilities. 4 Bro. Ch. Rep. 441. Mich. 1793. Lytton v. Lytton.

32. Payment of a legacy preſumed, after 40 years elapſed and no demand proved. 4 *Bro. Ch. Rep.* 115. *Mich.* 1792. *Jones* v. *Turberville.* 2 *Veſ. jun.* 11. S. C.

33. Bill by next of kin for perſonal eſtate, ſecured by mortgage, *given to a charity.* The will was dated in 1754; the bill was not filed

filed till 1792. In a common case the suit could not be sustained after such a lapse of time; but in this case the parties not being appriſed of the law, as to the bequeſt of money on real ſecurity given to a charity being void, and no preſumption on that account ariſing of a releaſe, his Honour referred it to the Maſter to inquire into and ſtate the circumſtances. 4 *Bro.* 214. *Feb.* 1793. *Pickering* v. *Earl of Stamford.* 2 *Veſ. jun.* 272. S. C. *Upon the report, the perſonal eſtate was decreed to the next of kin.* 2 *Veſ. jun.* 581.

34. Account of rent of an eſtate held of truſtees; the ſtatute of limitations was inſiſted on, but the account was ordered only for ſix years before the bill filed. 4 *Bro. Ch. Rep.* 468. *Hercy* v. *Ballard.*

35. Creditors are not relieved in equity after groſs laches; therefore where a creditor, ſeven years after coming of age, filed a bill to obtain the benefit of a decree to account, and after anſwer took no ſteps for 33 years, and then filed another bill againſt the reſiduary legatees of a party, whoſe aſſets were diſtributed with notice to the plaintiff, and againſt other repreſentatives, the bill was diſmiſſed upon the laches only, though the queſtion of ſatisfaction was doubtful. 2 *Veſ. jun.* 87. 1793. *Hercy* v. *Dinwoody,* 4 *Bro. Ch. Rep.* 257. S. C.

36. Attornies' bills of coſts examined after a long period, and payments made. 2 *Veſ. jun.* 202. 1793. *Newman* v. *Payne.*

37. Statute of limitations cannot be pleaded to a legacy, nor to an annuity. 2 *Veſ. jun.* 571. 1795. *Higgins* v. *Crawfurd.*

38. Defendant pleaded 40 years poſſeſſion without account or admiſſion of any debt to a bill ſetting up an old mortgage, and ſtating an account ſettled, and that owing to infancy, coverture, *and other diſabilities,* plaintiff could not proceed. Plea allowed. 2 *Veſ. jun.* 669. *July* 1795. *Blewit* v. *Thomas.*

39. *Laches* do not run upon a large body of creditors. 3 *Veſ. jun.* 740. *May* 1798. *Whichcote* v. *Lawrence.*

40. Forty-ſix years after a decree, directing an execution of the truſts of a will, and a conveyance in fee to the tenant in tail male, who had alſo the reverſion in fee, with the conſent of the only intermediate remainder-man in tail male, a bill was filed againſt their deviſees: the plaintiffs claiming under an *old voluntary* grant out of the reverſion, the eſtates tail being ſpent and no recovery having been ſuffered, and praying a diſcovery and conveyance, a general demurrer was allowed; though the deviſe and conveyance were ſtated only by way of pretence, and not expreſsly charged; the whole right, as againſt the defendant, being founded upon that conveyance. 5 *Veſ. jun.* 3*d November* 1799. *Fletcher* v. *Tollet.*

41. Upon poſſeſſion for many years, the origin of which did not appear, nor any title except as *ceſtui que truſt* under a term to raiſe a ſum of money, the court would not preſume any other title, and decreed the plaintiff to be let into poſſeſſion on paying the charge; but with reluctance, and on account of the *laches,* re-

Lunatic, Non compos, and Idiot.

15 Vin 111.

(A) *Cuſtody.* Who ſhall have it, and how.

1. THE cuſtody of lunatic may be granted to a *feme covert*, though ſhe be not *ſui juris*, but under the power of her huſband. 3 *P. Wms.* 111. 1720. *Ex parte Kingſmill, in notis.*

2. One, though of great age, being deprived of his memory, and become almoſt *non compos mentis*, was admitted to anſwer by his guardian, in regard the demand in queſtion was but ſmall; but had the demand been conſiderable, the regular way had been to have taken out a commiſſion of lunacy, and have gotten a committee aſſigned. *Ibid. in notis. Anon.*

3. Vagrants only, and not perſons of rank, are within the act which empowers juſtices of the peace to take care of lunatics. 2 *Atk.* 52. *Anon. Auguſt* 1740.

4. Whether the ſtat. 4 *G.* 2. extends to lunatics at large, or only to lunatics of whom the cuſtody has been granted by the great ſeal; and whether it extends to lunatics of whom a curator has been appointed abroad. *Amb.* 80. *Ex parte Marchioneſs of Anandale. December* 1749.

5. A committee was appointed of the lunatic's perſon and eſtate, with a reſtriction not to receive any of the eſtate himſelf, and a receiver was alſo appointed. *Amb.* 104. *Ex parte Billinghurſt. Auguſt* 1750.

6. Bankruptcy of the committee of the perſon of a lunatic is a ſufficient cauſe for removing him on account of the fund for maintenance; but the cuſtody of the perſon will not be changed if the Maſter finds it proper, with regard to the comfort of the lunatic that it ſhould continue. 3 *Veſ. jun.* 2. *Ex parte Mildmay. Nov.* 1795.

15 Vin 132.

(B) *Power of the Committee.* And Allowances.

1. THE court allowed the profits of the lunatic's eſtate to the committee for the maintenance of his perſon. The lunatic dies, his adminiſtrator brings a bill for an account of theſe profits; the defendant, the committee, pleads this order of court for the allowance of the profits for the lunatic's maintenance. The plea was ordered to ſtand for an anſwer; but as there was no fraud, the court would not grant the relief prayed. 3 *P. Wms.* 105. *Enſt.* 1731. *Sheldon* v. *M. Juſtice Forteſcue Aland, and others.*

2. The

2. The king's grant of a lunatic's eſtate without account is void; but the king or lord chancellor may allow ſuch yearly maintenance to a lunatic as amounts to the yearly value of his eſtate. *Ibid.* 110.

3. A committee of a lunatic's real eſtate may cut down timber for repairs. 2 *Atk.* 407. *Aug.* 1742. *Ex parte Ludlow.*

4. A ſum of money deviſed to be laid out in lands in *England* in truſt for *A.*, with remainders over, is, by act of parliament, ſecured on *A.*'s eſtate in *Scotland* during his minority. *A.* attains the age of 21, and becomes lunatic: the money may be called in and laid out purſuant to the truſt. It is to be conſidered as an eſtate in *England*, and a proportion to be ſettled for his maintenance and debts between his eſtates in *England* and *Scotland*. Another ſum, in the Exchequer in *England*, ariſing from the ſale of heritable juriſdiction in *Scotland*, conſidered as real eſtate in *Scotland*. 2 *Veſ.* 381. *July* 1751. *Marquis of Anandale* v. *Marchioneſs of Anandale.*

5. The committee of a lunatic not allowed any thing for his trouble; but in this caſe, on account of particular circumſtances, the allowance for maintenance was increaſed. *Amb.* 78. *In the Matter of Anneſley.* *Oct.* 1749.

6. It is a rule never to vary or alter the property of a lunatic ſo as to effect any alteration as to the ſucceſſion to it. *Amb.* 80. *Dec.* 1749. *Ex parte Marchioneſs of Anandale.*

7. In this caſe the court ordered money to be lent to diſcharge incumbrances on the lunatic's *Scotch* eſtate, it being for his convenience; and divers inſtances were mentioned of the power of the Chancellor over the *Scotch* eſtates of a lunatic, who was in *England*. *Ibid.*

8. The committee has a lien on the lunatic's eſtate recovered by him; and the ſolicitor employed for him was declared to ſtand in the place of the committee, and to have a lien for his bill. *Amb.* 103. *Barneſly* v. *Powell.* *Aug.* 1750.

9. Committee of a lunatic's eſtate not permitted to paſs his accounts, without inquiry what money is in hand from time to time. 1 *Veſ. jun.* 156. *Ex parte Catton.* *June* 1790.

10. On a bill by a ſon, the committee of the father, who was a lunatic, to ſet aſide a voluntary ſettlement by him, a motion, for the defendant to be at liberty to let the houſe, ſell the furniture, and bring the money into court, was refuſed, the plaintiff not conſenting. 1 *Veſ. jun.* 160. *Colman* v. *Croker.* *June* 1790.

11. A lunatic is to have every comfort his ſituation and fortune will admit of, without any conſideration for thoſe in expectancy. *Veſ. jun.* 296. *Ex parte Chumley.* *May* 1791.

15 Vin. 135. (D) *Acts*, or *Grants*, &c. of a Lunatic, confirmed or avoided.

1. WHERE, before an inquiſition of lunacy, a perſon, who was found a lunatic, has made a purchaſe with the approbation of his only ſon, the court would not change the diſpoſition which had been made of the ſum of money, but let the purchaſe ſtand; and it was ſaid, that the court had allowed part of a lunatic's perſonal eſtate to be laid out in repairs, and even upon improvements of his real eſtate. 2 *Atk.* 414. *Sergeſon* v. *Sealy*. *Oct.* 17 2.

2. 15 *Geo.* 3. *c.* 20. *enacts that the marriage of a lunatic, only found ſo, ſhall be null and void, unleſs he be previouſly declared ſane by the Lord Chancellor.*

15 Vin. 137. (D. 3) Other Matters.

1. NO appeal from an order of the Lord Chancellor touching lunatics to the Houſe of Lords, but only to the king in council. 3 *P. Wms.* 104. 1731. *Sheldon* v. *Mr. Juſtice Forteſcue Aland, and others.*

2. After the juriſdiction of the court of wards was taken away, the juriſdiction over idiots and lunatics reverted back to the court of Chancery, to which it originally belonged. 2 *Atk.* 553. 1743. *The Bailiffs and Burgeſſes of Burford* v. *Lenthall.*

3. Where there is any miſbehaviour in the execution of a commiſſion of lunacy, the court, upon examination, may quaſh it, and direct a new commiſſion. 3 *Atk.* 6. *Nov.* 1743. *Ex parte Roberts.*

4. The perſon againſt whom a commiſſion of lunacy iſſued, on the different appearance he made upon a ſecond inſpection, was allowed to traverſe the inquiſition, and the grant of the cuſtody was ſuſpended till further order. *Ibid.* 7.

5. The Lord Chancellor can make an order in a lunatic's affairs after his death. *Amb.* 706. 1772. *Ex parte Grimſtone.*

6. Mortgage on a lunatic's eſtate paid off with his money, and the mortgage term ordered to be aſſigned in truſt to attend the inheritance, and held not to go to his next of kin. *Ibid.*

7. Where there is a reference to the Maſter in a caſe of lunacy, he ſhall make his report, although the lunatic be dead. 3 *Brs. Ch. Rep.* 238. 1791. *Ex parte Armſtrong.*

8. Petition that a fund in court belonging to the plaintiff, or the intereſt of it, might be paid to the plaintiff's wife, for the maintenance of himſelf and family, he being in a ſtate of mind, which, though not amounting to lunacy, was of too great imbecility, in conſequence of a paralytic ſtroke, to do legal acts. And the court ordered the intereſt to be paid to the wife from time to time.

time. 4 *Bro. Ch. Rep.* 100. 1792. *Bird* v. *Lefevre.* See *Ex parte Nadin*, before Lord *Thurlow*, 4 *Nov.* 1786., where he ſaid that he was not againſt the practice of finding a man a lunatic, who was, by the infirmities of age, rendered unequal to the management of his affairs, but that the more uſual way was to appoint him a guardian. 1 *Fonb. Treat.* 64.

9. Timber was felled on a lunatic's eſtate by the committee by order of the court, the produce is perſonal eſtate of the lunatic. *Oxenden* v. *Lord Compton*, 4 *Bro. Ch. Rep.* 231. and 2 *Veſ. jun.* 61. S. C. 1793.

10. In this caſe the Chancellor, in deciding a motion for a new trial, laid down general principles relating to caſes of lunacy. 4 *Bro. Ch. Rep.* 443. 1792. *Attorney-General* v. *Panther.*

11. The Lord Chancellor cannot, upon a petition in lunacy, order part of a lunatic's eſtate to be ſold for payment of his debts, to prevent a bill by his creditors. 5 *Veſ. jun.* 556. 1800. *Ex parte Smith.*

(E) *How* the Lunacy ſhall be *tried*, and what is a good Return. 15 Vin. 138.

1. THE rules of judging in equity and at law in caſes of inſanity are the ſame. 2 *Atk.* 327. 1742. *Bennet* v. *Vade.*

2. An inquiſition of lunacy is always admitted to be read, but is not concluſive evidence, as it may be traverſed. 2 *Atk.* 412. 1742. *Sergeſon* v. *Sealy.*

Where a man was found lunatic on two inquiſitions, the court would not allow him to traverſe. 3 Atk. 184. 1744. Ex parte Barneſly. *But where an inquiſition found a perſon an idiot, the court allowed him to traverſe.* Cited in the above caſe of Ex parte Barneſly. *The heir of a lunatic is bound upon the traverſe of an inquiſition.* 3 Atk. 308. 1746. In the Matter of Roberts. *And where the alienee and the lunatic traverſe, if he be found a lunatic at the time of the alienation, the alience is bound.* Ibid.

3. That *W. B.* was incapable of governing himſelf and his lands, &c. is an illegal and void return to a commiſſion of lunacy. 3 *Atk.* 168. 1744. *Ex parte Barneſly.* The uniform returns are, *lunaticus, non compos mentis*, or, ſince the proceedings have been in *Engliſh*, of unſound mind. *Ibid.*

4. Where the lunacy of a perſon is in queſtion, the court will make a proviſional order as to his effects, till the point as to the lunacy is determined. 3 *Atk.* 635. 1748. *In the Matter of Heli.*

5. In this caſe a commiſſion was denied, the party being only of a very weak underſtanding. 2 *Veſ.* 407. *Lord Donegal's* caſe. And it was ſaid by the Lord Chancellor *Hardwicke*, that finding a man an *idiot* for ſo many years paſt was good. *Ibid.*

6. A commiſſion iſſued to inquire of the lunacy of one beyond ſea, directed where the manſion-houſe and great part of the eſtate lay. 2 *Veſ.* 401. *Aug.* 1751. *Ex parte Southcot. Amb.* 109. S. C.

7. The commiſſioners and the jury have a right to inſpect the perſon. And coſts were decreed againſt a perſon having him in his cuſtody and not producing him. *Ibid.*

8. A perſon found a lunatic by a competent juriſdiction abroad, conſidered a lunatic here. 2 *Veſ. jun.* 588. 1795. *Ex parte Gillam.*

9. No objection to the return to an inquiſition finding a perſon lunatic, that it does not ſtate, that the lunatic has or has not lucid intervals. A traverſe to a return to an inquiſition finding a perſon a lunatic is a right by law, though the Lord Chancellor is not diſſatisfied with the return upon the evidence. And the order was ſuſpended for the purpoſe of taking the traverſe. 5 *Veſ. jun.* 450. 1800. *Ex parte Ferne.*

10. In the above caſe, it was ſaid by the Chancellor that the pleading a traverſe is ſhort; merely ſtating the inquiſition, taking the common traverſe upon it, and then the attorney joins iſſue. *Ibid.*

11. Upon the return of the traverſe to the inquiſition of lunacy, finding that the party was a lunatic at the time of her marriage, and at the time of taking the inquiſition, but at the time (of the verdict) was not a lunatic, the commiſſion was ſuperſeded. The Chancellor doubted whether the double return was good. 5 *Veſ. jun.* 833. 1801. *Ex parte Ferne.*

12. Traverſe to an inquiſition finding a perſon lunatic is *de jure*, and not matter of favour. *Ibid.*

15 Vin. 140. (K) Lunatic and Truſtee enabled to transfer.

1. A Found *non compos* before the ſenate of *Hamburgh*, a mortgagee within the ſtat. 4 *G.* 2. *c.* 10., and will be directed to convey. 1 *Veſ.* 298. 1749. *Ex parte Otto Lewis.*

2. A truſtee found a lunatic by the Maſter's report, cannot be ordered to convey under the ſtatute, unleſs a commiſſion of lunacy has iſſued. 2 *Veſ. jun.* 587. 1795. *Ex parte Gillam.*

Mariners.

15 Vin. 233. (A. 2) Mariners' Wages. *Payable* or loſt. *In what Caſes*, and *how much.*

1. ACTION by a ſailor for wages in a voyage "to *Newfoundland*, and from thence to *Spain* or *Portugal*, or ſome port in the *Mediterranean*." The contract was, "That the wages ſhould

ſhould be paid at that port at which ſuch wages were *uſually* due." Upon the trial it appeared that the ſhip was taken after its arrival at port in *Newfoundland*, and upon its voyage from *Newfoundland* to its port of delivery. The court were of opinion that no wages were due, the ſhip being loſt before its arrival at its port of delivery; for it is one entire voyage, the fiſh being the only lading of the ſhip. *Hernaman* v. *Bawden et al. Executors of Ford*, 3 *Burr.* 1844.

2. The plaintiff was a ſailor on board defendant's ſhip, which was taken and ranſomed. The captain, on behalf of his owners, promiſed to pay him 4*l.* a-month in order to induce him to become a hoſtage. This is binding on the owners, and the plaintiff ſhall recover the amount in an action againſt them. *Yates* v. *Hall et al.* 1 *Term Rep.* 71.

3. An officer or ſailor who has engaged to ſerve on board a letter of *marque* for certain wages during the voyage, and a ſhare of all prizes, is not entitled to any part of the wages, if the ſhip is taken before ſhe completes her voyage; although he ſhall have been ſent from the ſhip before the capture, as prize-maſter, on board a prize taken in the courſe of the voyage. *Abernethy* v. *Landale*, *Doug.* 523.

4. The cargo of the ſhip was loſt by the capture of a privateer, who carried her into *G.* The maſter ſtaid three months to refit, and take in new lading, and, to prevent the ſeamen going away, agreed to pay them ſo much *per* month while they ſtaid. In an action, the maſter would have excuſed himſelf, on the rule that freight is the mother of wages, and that none are paid while the ſhip is lading and unlading. *Pratt* C. J. agreed that this was the general doctrine, but held it not ſufficient to control the ſpecial agreement. *Campion* v. *Nicholas*, 1 *Stra.* 405.

(B) Wages. Suable for. *In what Court*, and when. 15 Vin. 236.

1. MARINERS cannot ſue in the court of Admiralty for wages due upon a ſpecial agreement under ſeal, and executed at land; and the court granted a prohibition. *Howe Eſq.* v. *Napier*, 4 *Burr.* 1944. *Day et al.* v. *Searl*, 2 *Stra.* 968. S. P.

2. But after ſentence, the court will not grant a prohibition upon this ground, where it does not appear upon the face of the proceedings, that the court below have no juriſdiction. *Buggin* v. *Dennet*, 4 *Burr.* 2035.

3. A carpenter of a veſſel may ſue for wages in the Admiralty. *Wheeler* v. *Thompſon*, *Stra.* 707.

4. So may a boatſwain. *Ragg* v. *King*, *Stra.* 858.

5. But a ſuit ſhall not be allowed in the Admiralty for the wages of the maſter; for his contract is founded upon the credit of the owners, and not of the ſhip. *Ibid.*

6. Where the mate became maſter during the voyage, and ſued in the Admiralty for his wages as mate, and for a further allowance

ance after he became master, the court granted a prohibition *quoad* the time he was master, and refused it *quoad* the time he was mate. *Reed* v. *Chapman*, *Stra.* 937.

7. Though a pilot be a mariner, yet he cannot sue in the Admiralty for wages for piloting a ship from *Sea Reach* to *Deptford*, both being within the body of the county, and therefore out of the Admiralty jurisdiction. *Ross* v. *Walker*, 2 *Wils.* 264.

Market.

(B) Fair. *Stallage.*

15 Vin. 241.

1. IN trespass for breaking and entering the plaintiff's close, and erecting a stall there. Defendant pleaded three pleas. The 3d, being the material one, was, "That there is a public market held every *Saturday* in the *locus in quo* for selling butchers' meats; wherefore he entered the market with his meat in order to sell it, and for that purpose erected a stall for the necessary exposing his meat to sale, and laid it upon the stall *prout ei bene licuit quæ est eadem*," &c. Replication, that plaintiffs were seised in fee of the close and market, and that defendant, without their licence, and of his own wrong, entered and erected the stall; frivolous rejoinder and demurrer. Resolved *per cur.* 1st, That though every person has of common right a liberty of coming into a public market to buy and sell, without paying any toll, if not due by custom or prescription; yet he has not of common right a liberty of placing a stall there, but must have licence from the owner of the soil, if there be no particular sum fixed by the custom of the market for stallage. If there be a sum or duty by custom, that cannot be exceeded, but still he must agree with the owner of the soil. If it be a toll it is *sui generis*, for toll can only be due by grant or prescription; but the owner is of common right entitled to stallage in a new erected market, and the soil is no further appropriated to public use than the common right to enter the market to buy and sell. 2dly, Trespass is the proper remedy; for neither debt nor *assumpsit* would lie, nor could the owner of the soil distrain, as there is not any certain fixed sum or duty, or contract expressed or implied. *The Mayor, &c. of Northampton* v. *Ward*, 1 *Wils.* 107. 2 *Stra.* 1238. S. C.

2. If the soil or pavement is picked, dug up, or broke, in erecting a stall, *&c.* it is called *piccage*. *Ibid.*

3. So, where trespass was brought for breaking and entering plaintiff's close, and placing thereon divers tables, stools, baskets, pots, pans, and other utensils. Defendant pleaded, 1st, general issue; 2d, justification, for that the *place where* is an open market, and

and that he placed the tables, &c. there to expoſe them to ſale. Replication and demurrer. Judgment for the plaintiff. For by the laſt caſe no man can erect a ſtall in a market without leave, and the court cannot criticiſe and diſtinguiſh between a *table* and a *ſtall*. *The Mayor, &c. of Norwich* v. *Swan*, 2 *Black.* 1116.

(C) Fair. *What Things Strangers may do.* 15 Vin. 245.

UPON the authority of *Davis* v. *Leving*, 2 *Lev.* 89. cited in *Vin. Abr.* (C), *pl.* 3. it was held, That the inhabitants of one market town, city, borough, or town corporate, are not prohibited by 1 & 2 *Ph. & M. c.* 7. from ſelling woollen cloth, &c. in other market towns, &c. by retail, and not in open fair. *Lee* v. *White et al. Dougl.* 243.

(F. 3) Proceedings. Pleadings and Judgment. How. 15 Vin. 247.

1. A *Quo warranto* will not lie for encouraging and promoting the holding a market; for the defendants are only guilty of a miſdemeanor at moſt, and there is no uſurpation of a franchiſe. *Rex* v. *Marſden et al.* 3 *Burr.* 1812. 1 *Blac. Rep.* 579.

2. *Quære* whether an information in the nature of a *quo warranto* for uſurping a fair or market upon the crown can be granted upon the *application* of a *private* perſon? The court gave no decided opinion upon the queſtion in *Rex* v. *Marſden*, determining that caſe upon the point mentioned above; but they ſeemed to incline that it would not lie. *Ibid.*

(H. 2) *What* Things *may be ſold out of the Market.* 15 Vin. 248.

NO hawker can expoſe goods to ſale in any part of a market town but the public market place by 29 *G.* 3. *c.* 26. *ſ.* 16, 17. *Rex* v. *Redſearne*, 4 *Term Rep.* 273.

(I) Of the Toll *Book-keeper*, and Property altered by Sale in Market overt or Fair. 15 Vin. 249.

THE original owner of goods ſtolen, who proſecutes the felon to conviction, has a right to the reſtitution of them: but he cannot recover the value of them in trover from a perſon who purchaſed them for a valuable conſideration in market overt, and who has reſold them before conviction, notwithſtanding that the owner gave him notice of the robbery while they were in his poſſeſſion. *Horwood* v. *Smith*, 2 *Term Rep.* 750.

[A]

Marriage.

15 Vin. 244.

(D) What is, or amounts to a Marriage, or ſhall be ſaid Evidence thereof.

1. IT was doubted by Lord *Mansfield* whether a marriage in *Scotland*, in fraud of the *Engliſh* marriage act, was valid. 1 *Bl. Rep.* 239. 2 *Bur.* 1080.

2. But ſuch a marriage was ſolemnly held good, firſt in the ſpiritual court and afterwards by the delegates. *Compton* v. *Bearcroft*, *cor. Delegates*, 1 *Dec.* 1768. *Bull. N. P.* 113.

3. In a ſuit for jactitation of marriage, and plea of a clandeſtine marriage (before the marriage act); ſtrong acknowledgments for 18 years together were held by the delegates upon appeal to be ſufficient to eſtabliſh the marriage even *inter vivos*, although no actual proof of it was given. *Hervey* v. *Hervey*, 2 *Bl. R.* 876.

Sed vide if given in a collateral ſuit for a criminal action. *Ib.*

4. A marriage in *France*, eſtabliſhed by the ſentence of a court having proper juriſdiction thereof there, is concluſive by the law of nations. *Roach* v. *Garvan*, 1 *Ves.* 159.

5. Said *per* Lord *Hardwicke*, *ibid.* That when the perſons and fortunes of minors are under the care of the court of Chancery, a foreigner who contrives a marriage with one of them abroad is guilty of a contempt of the court, and if I afterwards got him here I would puniſh him. *Roach* v. *Garvan*, *ib.* 159.

6. In a queſtion relative to a pariſh ſettlement, it is not neceſſary to ſhew that all the ſolemnities were regularly obſerved; for though in a ſuit of jactitation of marriage ſuch proof is neceſſary, yet in other caſes (as the legitimacy of children and the like) the uſual preſumptive proofs of marriage are not taken away by the ſtatute. *St. Devereux* v. *Much Dew Church*, 1 *Bl. R.* 367.

(E) Good, in reſpect of the Perſon to whom. —— Degrees prohibited.

1. A Prohibition was denied to a ſuit in the ſpiritual court for marrying his wife's ſiſter's daughter. *Denny* v. *Aſhwell*, 1 *Str.* 53.

2. The eccleſiaſtical court cannot annul an inceſtuous marriage after the death of one of the parties; but may proceed to puniſh the ſurvivor. *Brownſword* v. *Evans*, 2 *Ves.* 245.

(E) The Licence and Regiſtring; Banns and Place where; and Puniſhment of marrying otherwiſe; what; and in what Caſes.

1 Vin. 258.

1. 26 GEO. 2. c. 33. ſ. 1. All banns of marriage ſhall be publiſhed in an audible manner in the pariſh church, or chapel, in which banns had been uſually publiſhed, of the pariſh to which the perſons belong, upon three *Sundays* preceding the marriage, in time of ſervice, immediately after the ſecond leſſon; and if they live in different pariſhes, to be publiſhed in each; and if in an extra-parochial place, in the next pariſh church; and all the rules of the rubrick; and the marriage to be ſolemnized in one of the churches where the banns were publiſhed.

Sect. 2. No parſon ſhall be obliged to publiſh banns unleſs notice of the names, place, and time of reſidence has been delivered ſeven days before.

Sect. 3. Parſon ſolemnizing marriage, after publication of banns, between perſons under age, without conſent of parents or guardians, but without notice of ſuch diſſent, ſhall not be puniſhable; and if the parents or guardians ſhall declare or cauſe to be declared, at the time of publication of banns, their diſſent thereto, the publication of banns ſhall be void.

Sect. 4. No licence ſhall be granted to ſolemnize a marriage except in the pariſh church or chapel where one of the parties has reſided for at leaſt four weeks; or, if an extra-parochial place, in the adjoining.

Sect. 5. Saving to the Archbiſhop of *Canterbury* his right of granting licences to marry at any convenient place.

Sect. 8. If any perſon ſhall ſolemnize matrimony in any other place than a church or public chapel, unleſs by licence from the Archbiſhop of *Canterbury*, or ſhall ſolemnize matrimony without publication of banns, without a licence; ſhall be guilty of felony, and be tranſported for 14 years; and all marriages ſo ſolemnized ſhall be null and void.

Sect. 10. Provided that after ſolemnization of marriage, under publication of banns, proof of reſidence in the pariſh ſhall not be neceſſary; nor, where by licence, proof of reſidence in the pariſh where ſolemnized; nor ſhall proof to the contrary be admitted.

Sect. 11. Marriages by licence, where either party, not a widow or widower, is under 21, without the conſent of the father or guardian, or mother (if no father or guardian), firſt had and obtained, ſhall be null and void.

Sect. 12. Where mother or guardians are *non compos mentis*, abroad, or refuſe conſent, the party may apply to the Lord Chancellor, who, if he finds the marriage proper, ſhall declare accordingly, and the marriage ſhall be valid.

Sect. 13. No ſuit in the eccleſiaſtical court ſhall lie to compel a marriage by reaſon of any contract.

Sect. 14. Churchwardens are to provide books in which the liſt of banns and marriages ſhall be kept, and the entries ſigned by the parſon.

Sect. 15. All marriages muſt be in the preſence of two witneſſes, and to be regiſtered, and ſigned by the parties, and witneſſes, and miniſter.

Sect. 16. Parſon convicted of making falſe entries, or altering or forging entries in the regiſter, or of forging any licence, or of deſtroying the regiſter, he ſhall be guilty of felony, and ſuffer death.

Sect. 17. This act not to extend to the marriages of any of the royal family.

Sect. 18. Not to extend to *Scotland*, nor to any marriages among Quakers or Jews, where both parties are of either of theſe religions; nor to any marriage ſolemnized beyond ſeas.

2. The marriage of a pauper, being contrary to the 26 *G.* 2. *c.* 33. *ſ.* 11. (the huſband being under age), was holden to be abſolutely void, for the marriage act is made againſt both the contracting parties, and therefore they cannot waive the diſſabilities of it, as they might if made for their benefit. *Cheldham* v. *Preſton*, *Burr. Sett. Caſ.* 486. S. C. 1 *Bl. R.* 192.

3. A marriage was held void, being celebrated in a chapel erected ſince 26 *G.* 2., although marriages had *de facto* been frequently celebrated there. *Rex* v. *Nathfield*, *Doug.* 659.

4. In conſequence of this determination the ſtat. 21 *G.* 3. *c.* 53. paſſed, by which all marriages, *before that time*, ſolemnized in any conſecrated church or chapel erected ſince 26 *G.* 2. were made valid, and the clergymen, who had celebrated the ſame, were exempted from the penalties of that act.

5. A baſtard is within the marriage act, and if married under age, without banns, and without conſent of father, guardian, or mother, it is void. *Rex* v. *Hodnett*, 1 *Term Rep.* 96.

25 Vin. 264.

(I) Brocage Bonds, &c.

1. *A.* Treats for the marriage of his ſon, and in the ſettlement of the ſon there is a power reſerved to the father to jointure any wife whom he ſhould marry in 200*l. per annum*, paying 1000*l.* to the ſon: the father treating about marrying a ſecond wife, the ſon agrees with the ſecond wife's relations to releaſe the 1000*l.*, but takes a private bond from the father for the payment of this 1000*l.* Equity will not ſet aſide this bond, for it would be injurious to the firſt marriage, which being prior in time is to be preferred. 3 *P. Wms.* 66. 1730. *Roberts* v. *Roberts*.

2. Plaintiff, having paid his addreſſes to the defendant *Hannah Woodhouſe*, againſt her father's conſent, prevailed upon her to execute a bond in the penalty of 600*l.* with a condition "that if the "above-bounden *Hannah Woodhouſe* do, on or before the expiration "of 13 months after the deceaſe of her father *Robert Woodhouſe*, "according

" according to the uſage of the church of *England*, eſpouſe the de-
" fendant *Ralph Shepley*, if the above-named *Ralph Shepley* will
" thereto conſent, and the laws of this realm will permit the
" ſame; or if it ſhall happen the ſaid *Hannah Woodhouſe* ſhall
" not nor will not marry the ſaid *Ralph Shepley* as aforeſaid, but
" ſhall happen to marry with ſome other perſon, then the ſaid
" *Hannah Woodhouſe* ſhall and will well and truly pay unto the
" ſaid *Ralph Shepley* the ſum of 500*l.* of lawful *Britiſh* money, at
" or immediately after the failure of ſuch marriage; but if it ſhall
" happen that the ſaid *Hannah Woodhouſe* ſhall die before the time
" appointed for the ſaid marriage, then the ſaid *Hannah Wood-*
" *houſe* ſhall leave and give the ſaid *Ralph Shepley* 10*l.* as a token
" of her love, to buy him a ſuit of mourning with, then this
" obligation to be void." There was alſo a bond from defendant to her in the like penalty, and with nearly the like condition. The father died, and after the expiration of 13 months the plaintiff filed her bill to be relieved againſt her bond, and died, and the ſuit was revived by her adminiſtrator. There was a croſs bill by *Ralph Shepley* to have ſatisfaction for this bond out of the aſſets of *Hannah Woodhouſe*, alleging he was willing to have married her, but was prevented having any acceſs to her by her brothers. The Chancellor conſidered *Hannah Woodhouſe*'s bond to the defendant in the nature of a marriage brocage bond, and decreed it to be delivered up, and diſmiſſed the croſs bill. 2 *Atk.* 535. 1742. *Woodhouſe* v. *Shepley.*

3. The plaintiff gave the defendant a note for 2000*l.* for undertaking to procure him a marriage with a lady; the fact being ſupported by affidavit, the court made an order on the defendant to keep the note in his own poſſeſſion, and not aſſign or indorſe it over, but would not extend the injunction ſo far as to reſtrain him from proceeding at law. 3 *Atk.* 566. 1747. *Smith* v. *Aykwell.*

4. Articles before marriage to ſecure an annuity out of the wife's eſtate to her ſervant, who had influence over her; and a bond for 1000*l.*; the bond was delivered up, and there was a new grant of the annuity after marriage. The conſideration of the bond and of the annuity was directed to be tried. 1 *Veſ.* 503. *July* 1750. *Cole* v. *Gibſon.*

5. Bill by huſband after the wife's death to be relieved againſt a bond given by her to her aunt juſt before marriage; where a debt is contracted for valuable conſideration, though concealed from the huſband, it is no fraud upon the marriage. This cauſe came on upon bill and anſwer, and a conſideration was ſworn poſitively to in the anſwer, and alſo, that it was at the requeſt of the wife herſelf that the obligee concealed the tranſaction from her huſband; the bill therefore was diſmiſſed with coſts. 2 *Veſ.* 264. 1751. *Blanchet* v. *Foſter.*

6. Parol evidence admitted to ſhew that though a bond on marriage was for 150*l. per annum*, yet the agreement was for 100*l.*; but the bill was diſmiſſed, as being founded on a private agree-

ment

ment to deceive a material party. 2 *Vef.* 376. *July* 1751. *Pitcairn* v. *Ogbourne.*

7. Injunction granted to reſtrain defendant from recovering a demand from one of the plaintiffs, he having repreſented to the agent of the other plaintiff, on a treaty of marriage with his daughter, that there was no ſuch demand exiſting. 1 *Bro. Ch. Rep.* 543. 1782. *Neville* v. *Wilkinſon.*

On a treaty of marriage between Lord Arbuthnot, *then a minor, and the daughter of* Morriſon, *it was agreed that* Morriſon *ſhould pay* 50,000 *marks as a portion for his daughter, and a ſettlement was agreed to be made by Lord* Arbuthnot *and his friends in conſideration of that fortune. The night before the execution of the articles* Morriſon *prevailed upon Lord* Arbuthnot *privately to ſign a writing, purporting that the real agreement was for* 40,000 *marks only, and that* Morriſon *had agreed to the contract for* 50,000 *marks upon the expreſs granting this private agreement, by which Lord* Arbuthnot *bound himſelf to releaſe* Morriſon *from* 10,000 *marks, part of the* 50,000 *marks. When Lord* Arbuthnot *came of age he brought his action to have this obligation reduced, on two grounds; firſt, that it was granted by him whilſt a minor, without the conſent of his guardians; 2dly, that it was* contra fidem tabularum nuptialium. *The Lords of Seſſion ſuſtained the reaſon of reduction, and held the obligation null; and on appeal to the Houſe of Lords, their decree was affirmed.* Morriſon v. Arbuthnot, *in Dom. Proc.* 1728., *cited in the above caſe, together with* Blanchet v. Foſter, 2 Vef. 264., *and* Webber v. Farmer, 2 Bro. Par. Caſ. 38.

25 Vin. 265. (K) Portions on Condition; in what Caſe the Breach forfeits the Condition.

1. THE truſt of a term under a ſettlement was, that if there ſhould be two or more daughters of the marriage; then the truſtees were to raiſe and pay to each the ſum of 2000*l.*, if ſhe marry with the conſent of her mother, if living, and a widow; if not, then with the conſent of the truſtees, or the ſurvivor of them, his executors, adminiſtrators, or aſſigns; and in caſe any of the daughters die before the portion was paid, that it ſhould not go to the executor, but the eſtate ſhould be exonerated thereof, or if raiſed ſhould go to him on whom the reverſion of the premiſes is limited to deſcend. The father afterwards by his will gives the farther ſum of 2000*l.* to each of his daughters, *as an augmentation of their portions, ſubject to the ſame conditions as their original portions*, and if any of the daughters die before the original portions become payable, then he wills that this 2000*l* ſhould not be paid to her executor, but that his *lady and executrix* ſhould have the reſiduum of this money, and makes her reſiduary legatee. The plaintiff *Hervey* married one of the daughters without conſent, and *Clutton* another, alſo without conſent; they are not entitled to the portions either under the ſettlement or will. 1 *Atk.* 361. 1737. *Hervey* v. *Aſton, Com. Rep.* 726. S. C.

2. "*I give the ſum of* 1000*l. to my only daughter* Mary Graydon, to be paid her at her age of 21 years or on the day of marriage, which ſhall firſt happen, provided *ſhe marry by and with the conſent of my executors, but in caſe ſhe die before the money becomes payable, on the conditions aforeſaid, then I give the ſaid* 1000*l. equally between my two youngeſt ſons*, Benjamin *and* Gregory Graydon—*Mrs.* Mary Graydon, *grandmother of* Mary Graydon, Mary Graydon, *the mother*, *and*

and Jeremy Gregory, *the uncle, to be executors.* The mother, after giving to her daughter *Mary Graydon* all her wearing apparel, jewels, &c. expreſſed herſelf as follows: "*then my will is, that in* caſe my daughter *Mary Graydon* ſhall marry before ſhe comes to the age of 21 years, without the conſent and approbation of my executor under his hand firſt had and obtained (if he be living), that then ſhe ſhall not be entitled to any part of ſuch legacies, as I have herein left her, but that whole ſhare ſhall be divided amongſt my ſons *Benjamin* and *Gregory Graydon*; the reſidue, after her debts and legacies paid, ſhe gives to her three children *Benjamin*, *Mary*, and *Gregory*, equally to be divided between them, ſhare and ſhare alike, and appoints her ſon *John Graydon* to be her ſole executor." Bill againſt the defendant *Hicks*, the huſband of *Mary Graydon*, to relinquiſh 1000*l.* left under the will of the father, ſhe having married without conſent of his executors, and alſo to relinquiſh the legacies under the will of the mother; *the executors under the will of the father were all dead before the marriage of* Mary Graydon, and *John*, the mother's executor, renounced. The court was of opinion, that *Mary Graydon* was entitled to the 1000*l.* under the will of the father, but not to the portion under the will of the mother. *Graydon* v. *Hicks*, 2 *Atk.* 16. 1739.

3. Truſtees ſaying in a letter, "*we ſhall be obliged to conſent for the happineſs of the lady*," will be conſtrued a preſent conſent. 2 *Atk.* 265. 1738. *Daley* v. *Deſbouverie.*

4. An executor brings a bill for the diſcovery of the defendant's marriage; ſhe demurs; for that if ſhe were to diſcover what is aſked it would be a forfeiture of her legacy of 1500*l.*, it being given conditionally, if ſhe married with the conſent of the truſtees under the will. Demurrer allowed. 2 *Atk.* 392. 1742. *Chauncey* v. *Tabourden*, *Ibid.* 616. *Chauncey* v. *Fenhoulet*, 2 *Veſ.* 265. 3 *Atk.* 260. *Lucas* v. *Evans.* S. P.

5. Queſtion on the marriage ſettlement of Sir *John Wrotteſley*, who created a term for years in truſt, "to raiſe and pay, if one "child only, 6000*l.*; if two, 6000*l.* to be equally divided; "if three or more, 8000*l.* to be equally divided, and to be paid "at their reſpective ages of 21, or marriage; and it was provided, "that if any of the ſaid younger children ſhould marry in the "father's life-time, without his conſent, and, after his death, "without the conſent of *the mother*, ſuch child ſhould forfeit his "or her ſaid intended portion, to be diſtributed among the reſt, "at the age of 21 or marriage, *with ſuch conſent*; with a farther "proviſo, that if any ſuch child ſhould marry *without ſuch con-* "*ſent*, or die before 21 or marriage, *with conſent*, the portion to be "divided among the ſurvivors, at the age of 21 or marriage, with "conſent." *Frances*, one of the daughters, married with Mr. *Bendiſh*, without the conſent of the mother; and it was held by Lord *Talbot*, in *Auguſt* 1734, that ſhe had forfeited her portion, and it was decreed to the other children. One of the daughters is ſince dead, before 21 or marriage; and the petitioner, Mr. *Bendiſh*, who married *Frances*, applies now in the right of his wife, who is

is 21, for her distributive share of her sister's contingent portion; and the question was, whether *Frances*, as she has forfeited her original portion, is entitled to a share of this contingent portion, on the death of her sister before 21 or marriage; and the court held she was not, and dismissed the petition. 2 *Atk.* 584. 1743. *Wrotteſley* v. *Wrotteſley*.

6. Where there is a condition annexed by a will to a devise, either of real or personal estate, and no notice required to be given; unless the legatees perform the condition, they cannot be entitled; and where there is a devise over, a forfeiture incurs. This was the case of a legacy on condition of marrying with consent. 2 *Atk.* 616. 1742. *Chauncey* v. *Graydon*.

7. "If my daughter marry with the consent of trustees, or the "major part of them, and signified in writing before such marriage "had, then I give to her, and not otherwise, 800*l.*;" and the testatrix directed *M.* to pay her 30*l.* yearly, whilst she continued sole, 15*l.* each *May* day, and *All Saints* day, and charged all her real estates with debts of all kinds and legacies. The daughter, after the death of the mother, married the plaintiff, without consent of the trustees, and died soon after; but before her death the trustees declared their consent in writing. The Chancellor directed the plaintiff to be paid the arrears of the 30*l.* *pro rata* till the marriage; and in case the personal estate should be exhausted by debts, so much of the real estate to be sold as will pay the 800*l.* and the arrears of the annuity. 3 *Atk.* 330. 1746. *Reynish* v. *Martin*.

8. Testator gave to each of his grand-daughters, who should be living and *unmarried* at the time of his death, on their respective days of marriage, "the sum of 1500*l.*, and he desired that none of his grand-daughters should marry without the consent of the father and mother, or the survivor of them; and therefore if any or either of them should marry without such consent, then by his will he revoked what was thereby directed to be paid to such grand-daughter or grand-daughters, and such of them should not be entitled to any benefit by virtue of such his will, further than what the father and mother, or the survivor of them, should direct; and he afterwards directs, that after the several legacies and sums directed to be paid are satisfied, if any sum of money should remain in the hands of the trustees, the survivors or survivor of them, the same should be paid to his daughter *Philadelphia* for life, and after her decease to the defendant *Bingham* and his heirs." The plaintiff, one of the grand-daughters, married without the consent of the father and mother, and filed her bill for the legacy; the mother of the plaintiff appointed trustees of the legacy for the plaintiff for her separate use for life, and to her issue, but if she has no issue, then to the defendant *Bingham*. The court was of opinion that there was no devise over in this case, and that the plaintiff was entitled to her legacy. 3 *Atk.* 364. *June* 1746. *Wheeler* v. *Bingham*.

9. Estate

9. Eſtate given to a wife during her widowhood, with remainder over; it is good as a limitation; but if given over on her marrying again within a limited time, it operates as a forfeiture. *Amb.* 209. 1753. *Jordan* v. *Holkham.*

10. Deviſe, in caſe his daughter ſhall marry with conſent *and approbation* of *N. H.* in writing, but in caſe ſhe marry without ſuch conſent *or* approbation, the whole, after the death of the ſurvivor of her and her huſband, to go to —— *&c.*; ſhe married without the *previous* conſent of *N. H.*, but he approved of the marriage afterwards in writing; held no forfeiture. *Amb.* 256. 1755. *Burleton* v. *Humfrey.*

11. Settlement on two daughters; proviſo, if either marry without the conſent of their mother, it ſhould be to her ſeparate uſe, *&c.* The mother propoſed and encouraged the marriage of one of her daughters with Lord *S.*, and afterwards refuſed her conſent out of *pique* and reſentment: the marriage was had without her conſent; no forfeiture. *Amb.* 263. 1755. *Lord Strange* v. *Smith.*

12. Teſtator bequeathed to his daughters 1500*l.* each, to be paid them reſpectively at the time of their marriages, with conſent of his executrix and executor, who are made guardians during their minority, with a clauſe for maintenance and education till 21; held, a child attaining 21, her legacy was veſted: the condition is to be underſtood as confined to marriage under 21. *Amb.* 662. 1768. *Knapp* v. *Noyes.*

13. Deviſe, if *A.* or *B.* ſhall marry into the families of *C.* or *D.* and have a ſon, then I give my eſtate to that ſon: if they ſhall not marry, then to *E.* *A.* and *B.* married, but not into the favoured families; the marriage is a condition precedent which they have their whole lives to perform, and *E.* has no claim till their deaths. 1 *Bro. Ch. Rep.* 55. *Randal* v. *Payne.*

14. Teſtator deviſes the reſidue of his eſtate to his children, but if any of the daughters ſhall marry without the conſent of the mother or guardian, her ſhare to go to thoſe unmarried; this is a condition ſubſequent, and a daughter, who married without conſent, is notwithſtanding entitled. 1 *Bro. Ch. Rep.* 528. 1780. *Jones* v. *Earl of Suffolk.*

15. The teſtator, among other proviſions, gave to a putative daughter 10,000*l.* in ſeveral events; one moiety at 21, *in caſe ſhe ſhould be then unmarried*; but if ſhe married before 21, *with conſent of her mother*, then the whole to be paid to her, or ſettled to her uſe; but if ſhe ſhould die before 25, the 10,000*l.* was given to the mother, to whom there was alſo a gift of the reſidue generally. The daughter married under 21, without conſent; ſhe does not come within the deſcription to which the gift attached; it is therefore void, and the 10,000*l.* ſinks into the reſidue given generally to the mother. 2 *Bro.* 431. 1788. *Scott* v. *Tyler.*

16. Legacy given to a female infant; by the codicil, teſtatrix gave the father a power, in caſe ſhe married, during his life-time,

without conſent, to appoint; ſhe marries *once* with conſent; the condition is ſatisfied. 3 *Bro. Ch. Rep.* 128. 1790. *Hutcheſon* v. *Hammond.*

17. Legacy to plaintiff, in caſe of marriage with conſent of parents; they conſent by a writing *to any marriage ſhe may contract*; after the deceaſe of the ſurvivor plaintiff marries; conſent was only neceſſary during the lifetime of the father and mother, or the ſurvivor; if otherwiſe, this general conſent *is ſufficient.* 4 *Bro. Ch. Rep.* 327. 1793. *Mercer* v. *Hall.*

18. Condition in reſtraint of marriage under 21, without conſent of truſtees, eſtabliſhed both as to a rent charge and a perſonal legacy. 3 *Veſ. jun.* 89. 1796. *Stackpole* v. *Beaumont.*

19. Condition by will, requiring the conſent of truſtees to marriage, not applicable to the ſecond marriage of a daughter, who had married between the date of the will and the death of the teſtator, and was a widow at his death. 3 *Veſ. jun.* 227. 1796. *Crommelin* v. *Crommelin.*

15 Vin. 272 (K. 2) Conditions annexed to Portions determined.

1. *A.* Gave 2000*l.* to *Agnes* his daughter, payable at her age of 21, or marriage, if ſhe marries with the conſent of her executors; provided if either of the legatees die before their legacies become payable, ſuch legacy to be divided between the ſurvivor of her brother and ſiſter. *Agnes* married at 15, without the conſent of the executors; held to be a condition *in terrorem*, and that the legacy is veſted, as marriage, one of the contingencies, has happened. 2 *Atk.* 184. 1741. *Underwood* v. *Morris.*

2. Perſonalty given to truſtees to pay dividends, *&c.* to *R.* at 28, or marriage, with conſent, and in caſe any of the children ſhould die before their ſhares became due, the ſhare to go to the reſt of the children, and their iſſue *per ſtirpes*. *R.* married without conſent, had a child, ſince dead, and died under 28; held the portion never veſted, but the teſtator, having five children, held that one fifth part of it veſted in her child, and it was accordingly decreed to the father as her repreſentative. 1 *Bro. Ch. Rep.* 303. 1783. *Hemmings* v. *Munckley.*

15 Vin. 272. (L) Settlements. By Agreement before Marriage. What is a good Performance. In regard of the Manor.

1. A Settlement will control a writing executed after, but the parties refuſing to execute a ſettlement without it, they muſt be conſtrued as one entire agreement, and both conſiſtent. 2 *Atk.* 560. *May* 1743. *Tyrrel* v. *Hope.*

2. The

2. The words *ſeparate uſe* were not in a note given by the huſband to his wife before marriage, by way of marriage agreement, yet the words "enjoy the profits," imply it. *Ibid.*

3. Settlement by the ſon tenant in tail in poſſeſſion, in conſequence of an agreement made during the life of the mother, who was tenant for life; and being beneficial to the family, not ſet aſide, though made at the inſtance of the father, who took an intereſt under it. 1 *Bro. Ch. Rep.* 369. 1784. *Minchant* v. *Minchant.*

(M) Settlements. Performance good. In regard of the *Matter*. 15 Vin. 273.

1. *A.* On marriage gave bond to ſettle an eſtate of inheritance of 100*l.* a year on himſelf and wife, and the iſſue of the marriage; he ſettled the perpetuity of a penſion payable out of the cuſtoms; held a good performance. *Amb.* 391. 1760. *Middleton* v. *Pryor.*

2. Perſonal eſtate is of ſo fluctuating a nature, that it is impoſſible to make every ſpecific article the ſubject of ſettlement. 5 *Veſ. jun.* 274. 1800. *Randall* v. *Willis.*

(N) Settlements after Marriage without Articles, or Agreement precedent. Good in what Caſes. 15 Vin. 274.

1. A Settlement being *voluntary*, is not for that reaſon fraudulent, but an evidence of fraud only; but there is hardly a caſe where the perſon conveying was indebted at the time of the conveyance, that it has not been deemed fraudulent. 1 *Atk.* 15. 1738. *Ruſſell* v. *Hammond.*

2. A voluntary ſettlement is not fraudulent, where the perſon making it was not indebted at the time, and ſubſequent debts will not ſhake it. *Ibid.*

3. Where the father tenant for life, and the ſon tenant in fee, join in a ſettlement, it is good againſt creditors; for the ſon might have diſpoſed of the reſiduary intereſt without the father's joining. *Ibid.*

4. Where the father takes back an annuity to the value of the eſtate compriſed in the ſettlement, it is *tantamount* to a continuance in poſſeſſion, and creditors will be relieved againſt ſuch a ſettlement. *Ibid.*

5. Upon the ſtatute 27 of *Eliz.* ſubſequent purchaſers ſhall prevail to ſet aſide a ſettlement, that is voluntary and not for a valuable conſideration. 1 *Atk.* 94. 1745. *Walker* v. *Burrows.*

6. A ſettlement after marriage is good, if it be upon payment of money as a portion, or an additional ſum, or even an agreement to pay money, if afterwards paid. 1 *Atk.* 190. 1744.

Brown v. *Jones*.—*Stileman* v. *Aſhdown*, 2 *Atk.* 479. S. P. *Ward* v. *Smallet*, 2 *Veſ.* 13. 2 *Veſ.* 308. *Hylton* v. *Biſcoe*.

7. Where a marriage ſettlement is executed after marriage, in purſuance of articles *previous* to the marriage, and the limitations are to the huſband for life, to the wife for life, and to the heirs of the body of the huſband to be begotten on the wife, it is executory, and will be carried into ſtrict ſettlement by the court: otherwiſe if executed after marriage without any articles previous to the marriage to direct the uſes of ſuch ſettlement. 2 *Atk.* 39. 1740. *Glanville* v. *Payne*.

8. It is not neceſſary that a man ſhould be actually indebted at the time he enters into a voluntary ſettlement to make it fraudulent; for if he does it with a view to be indebted at a future time, it is equally ſo, and ought to be ſet aſide. 2 *At.* 481. 1742. *Stileman* v. *Aſhdown*.

9. *A.*, entitled to 500*l.*, marries whilſt an infant; the huſband, by deed after marriage, agrees the 500*l.* ſhall be to her ſeparate uſe for life, and after her death, to the iſſue of the marriage; in the deed was a proviſo, impowering the truſtee to lend a part or the whole to the huſband: he lent him 500*l.*, and in fourteen months after the huſband became a bankrupt; the truſtee filed his bill to be admitted a creditor, and Lord *Hardwicke* decreed, that he ſhould come in as a creditor under the commiſſion for the money he paid to the huſband, ſaying, "that where a man married an infant, and made no proviſion before marriage, a ſettlement made afterwards is good, where there is no proof of his being indebted at the time." 2 *Atk.* 519. 1742. *Middlecome* v. *Marlow*.

10. A huſband who had 1733*l.* ſtock deviſed to him after marriage, veſts it in truſtees for the benefit of himſelf for life, of his wife for life, and afterwards for the benefit of his children; the ſettlement is void as to creditors before and after the marriage, and the truſt eſtate was decreed to be ſold and applied in payment of the huſband's debts. 2 *Atk.* 600. 1743. *Taylor* v. *Jones*.

11. A wife having a contingent intereſt, under a bond given by the huſband on the marriage, but no judgment entered up, nor any truſtees added for her, had alſo a leaſe of the corn-meter's office left her by the will of her father, whoſe executor would not aſſent to the huſband's ſale thereof, unleſs he made a further proviſion for her; but on a meeting with her friends, ſhe agrees, upon ſettling part of the money ariſing from the ſale for her ſeparate uſe during her huſband's life, and afterward for the children of the marriage, ſhe will part with her intereſt under the bond; the other part of the money to go to the huſband; who becomes bankrupt. Bill by the aſſignees under the commiſſion to ſubject her ſeparate property; but the court refuſed and diſmiſſed the bill. 2 *Veſ.* 17. 1750. *Ward* v. *Shallet*.

12. To impeach a ſettlement after marriage under the 13th *Eliz.*, the huſband muſt be proved to have been indebted at the time,

time, and to the extent of insolvency. The creditor not producing any evidence, his bill was dismissed; with liberty to file another. 5 *Ves. jun.* 385. *May* 1800. *Lush* v. *Wilkinson.*

13. A settlement after marriage reformed in favour of the issue against the devisee of the husband, claiming under the reversion, by his letter of instructions for drawing the settlement: but this equity did not prevail against creditors. 5 *Ves. jun.* 596. 1800. *Burstow* v. *Milvington.*

(O) Settlements after Marriage. By Agreement before Marriage. Good as to Creditors, &c.

15 Vin 276.

1. THE plaintiff, before her marriage with *John Tyrrell*, was seised in fee, or her mother Mrs. *Stanton* was, of an estate in *Berkshire*, and in consideration of the intended marriage, and of 1500*l.* paid to Mr. *Tyrrell* as her portion, it was agreed that the estate should be settled previous to the marriage, so as that one moiety might be enjoyed by the plaintiff's mother for her life, and after her decease by the plaintiff, or her trustees, for her sole and separate use, exclusive of her husband, and that she should receive the rents and profits during her husband's life, and that as well the said moiety after the plaintiff's decease, as the other moiety, should be settled upon such trusts as the plaintiff, by any deed in her lifetime or by will, should appoint. Mr. *Tyrrell*, the intended husband, undertook to procure deeds to be drawn pursuant to the agreement; but when the deeds were reading over to the plaintiff in order to their execution, she observed there was a mistake, for that the moiety of the premises limited to her mother for life, was after her decease limited to the use of Mr. *Tyrrell* for life, and not to her separate use, as had been agreed: and she refused to execute unless the mistake was rectified: in order to do this, it was then proposed by the trustees, that Mr. *Tyrrell* should give a note or writing under his hand, that the plaintiff should take and receive one moiety of the estate after her mother's death for her sole and separate use, according to the agreement, as if the same had been so settled by the release; and thereupon Mr. *Tyrrell*, previous to the execution of the deeds, gave the plaintiff a note or writing to the purpose aforesaid, and delivered it to the trustee named in the release, to keep for the plaintiff's benefit. The marriage was had, and Mrs. *Stanton*, the mother, died soon afterwards; and on the 14th *February* 1740, a commission of bankruptcy issued against Mr. *Tyrrell*. Mr. *Hope* and others were chosen assignees, and being got into the receipt of all the rents of this moiety, refused to let the plaintiff receive them, or to make any settlement for securing the receipt thereof pursuant to the agreement before marriage. The bill was therefore brought against *Hope* and the other assignees for an account of what they had received of the rents, and that a moiety of them for the future might be assured to the plaintiff for her sole

and ſeparate uſe. And the court was of opinion, that as ſhe would be entitled to relief againſt the huſband, ſhe was equally entitled to it againſt his aſſignees. 2 *Atk.* 558. *May* 1743. *Tyrrell* v. *Hope.*

2. Upon the marriage of the defendant with her late huſband, he and his father promiſed to ſettle an eſtate on her in conſideration of the marriage and 1000*l.* portion; but ſhe refuſing to let the father have the portion, he ſaid ſhe ſhould have none of his lands, and would not ſettle them upon her, but conveyed them to his ſon in fee. The ſon, ſeven years afterwards, being indebted, ſettled the eſtate upon her for a jointure, and then in ſtrict ſettlement, and died. His creditors brought this bill againſt his widow, and infant ſon, for ſatisfaction of the plaintiff's debt. The court was of opinion that there was no colour to ſay that this ſettlement was for a valuable conſideration. 1 *Veſ.* 27. 1747. *Beaumont* v. *Thorp.*

3. Huſband, on his ſecond marriage, contracts to pay money in truſt for the wife for life, and afterwards for the iſſue of that and a ſon by a former wife: his creditors cannot come upon this againſt the ſon, as being a voluntary diſpoſition in regard to him. 1 *Veſ.* 215. 1748. *Khell* v. *Beane.*

4. A man may, as between himſelf and his wife, make an an agreement or declaration of truſt in his life, which, though not for a valuable conſideration, ſhall take effect againſt his executors, but not againſt creditors. 1 *Veſ.* 539. 1750. *Attorney-General* v. *Whorwood.*

5. Settlement after marriage of the wife's property, reciting, and in purſuance of a parol agreement made before, in truſt as to part of the produce to the ſeparate uſe of the wife, as to the reſt for the huſband for life, then to the wife for life, then among the children according to the appointment of the ſurvivor, good againſt the creditors of the huſband. 1 *Veſ. jun.* 196. 1790. *Dundas* v. *Dutens.*

15 Vin. 276. (P) *Marriage* Agreements *unperformed.* Decreed.

1. *A.* On his marriage covenanted, that if his wife ſhould die before him, leaving iſſue of their bodies, he would pay, grant, ſecure, or ſufficiently ſettle to and for ſuch iſſue, one third part of all his chattels, real and perſonal, which at the death of the wife he ſhould be poſſeſſed of, to be divided between them, if more than one, as he ſhould direct. The wife died leaving two daughters; and the huſband, during the coverture, acquired ſome freehold leaſes for lives. Held, that theſe leaſes were included in the covenant, but that the daughters were not entitled to a diviſion, until after the death of the father, which he was decreed to give ſecurity to make. 5 *B. P. C.* 208. 1756. *Hauket* v. *Jones and others.*

2. By

2. By a ſettlement, made previous to the marriage of *A.* and *B.*, certain Exchequer annuities were veſted in truſtees in truſt for the huſband for life, then to the wife for life, and after both their deaths, for the children of the marriage equally at their ages of 21, happening after the death of their father and mother. There was iſſue only one ſon, who attained 21 and ſurvived his father, but died in the lifetime of his mother. Upon a queſtion between her and the ſon's executor, who was entitled to theſe Exchequer annuities, it was held, that they became veſted in the ſon on his attaining 21, and were deviſeable by him, notwithſtanding he died in his mother's lifetime. *Jefferys* v. *Reynous*, 6 *Bro. Par. Caſ.* 260. 1767.

3. Mr. *Marſh*, a mercer, died poſſeſſed of goods to the amount of 2000*l.* and upwards; ſome time after his death, his widow married her huſband's journeyman; but before the marriage articles were entered into, reciting that ſhe was entitled to an eſtate of the value of 600*l.* and upwards, and alſo reciting that he had taken the money and given a bond for ſecuring the ſum of 600*l.* to truſtees for her ſeparate uſe, and that ſhe ſhould have the power to diſpoſe thereof as ſhe ſhould think fit by deed or will; and being alſo in poſſeſſion of ſome plate belonging to her firſt huſband, ſhe had a further power by articles to ſell it and pay the money ariſing from the ſale into the hands of the ſame truſtees, for the uſe of her children by the firſt huſband. The wife is dead, having executed a deed and appointed the 600*l.*, and alſo the plate, for the uſe of her children, to be equally divided between them. The ſecond huſband is become bankrupt, and the children by the firſt applied to the commiſſioners to be admitted creditors for the 600*l.*, and to have the plate delivered up to them. The commiſſioners refuſed, upon the ſuggeſtion of the bankrupt, that he was drawn in, and deceived in the opinion he had of his wife's fortune before the marriage. The application to the court was, that the plate might be delivered up to the children, and that they might be admitted creditors under the commiſſion for 600*l.*; which was directed accordingly, the Chancellor ſaying that marriage, even without a portion, was a ſufficient conſideration for an agreement, and that a woman's fortune falling ſhort of the huſband's expectations, is no reaſon for ſetting aſide a marriage ſettlement. 1 *Atk.* 159. 1744. *Ex parte Marſh.*

4. Where a ſettlement made after marriage gives an equivalent to the iſſue for what they were entitled to under the ſettlement previous to the marriage, the court would have diſpenſed with carrying that before the marriage into execution: but in the ſettlement made after marriage in this caſe, no equivalent was given to the iſſue, and therefore the ſettlement *before*, which is for the benefit of the iſſue muſt be purſued. 2 *Atk.* 39. 1740. *Glanville* v. *Payne*.

5. A limitation in marriage articles to the huſband for life, to the wife for life, remainder to the iſſue of their two bodies, will not entitle a huſband, by virtue of ſuch a remainder, to diſpoſe of the

the eſtate as he ſhall think proper, but will be carried into ſtrict ſettlement. 2 *Atk.* 71. *Nov.* 1740. *Villiers* v. *Villiers.*

6. *Edward Buſſey*, termor for 99 years, by ſettlement conveys it to truſtees, in truſt, to permit his wife, *Grace Buſſey*, to receive the rents during the term, if ſhe ſo long live, and after her deceaſe to permit him to enjoy the rents during his life, and after his deceaſe, in truſt for *the heirs of the body of* Grace, *by* Edward Buſſey; and for default of ſuch iſſue, remainder to *Henrietta Hodgſon* for life, and after her deceaſe, in truſt for her two ſons, *William* and *Edward*. *Edward Buſſey* died, never having had any iſſue, and *Grace* his wife ſurvived him. Lord *Hardwicke*, Chan., held, that the whole term did not veſt in *Grace Buſſey*, and that the words "*heirs of the body*" *were not words of limitation, but words of purchaſe*; and directed the leaſe to be depoſited for the benefit of all parties. 2 *Atk.* 89. *Nov.* 1740. *Hodgeſon* v. *Buſſey.*

7. *Elizabeth Burnaby*, by an agreement made on her father's and mother's marriage, was entitled to 6000*l.* Mr. *Burnaby*, juſt before his marriage, ſigned a paper, whereby he agreed that every thing, which ſhould come to *Elizabeth* by her father's death, ſhould go to them for their reſpective lives, and after the death of the ſurvivor, to the heirs of the body of *Elizabeth* by him begotten: as this was a limitation to the heirs of the wife, it veſted in her only, and the huſband conſenting, the court decreed the 6000*l.* to be ſettled on her and her children. 2 *Atk.* 474. *Dec.* 1742. *Green* v. *Ekins.*

8. *A.*, a younger ſon of *B.*, by his marriage ſettlement recites the proviſions he was entitled to by his father's ſettlement, and among the reſt to an equal ſhare of 2000*l.* after the father's death; then there was a truſt for the benefit of the iſſue of the marriage, and a covenant by him that all ſuch ſhare of the ſaid 2000*l.*, or any other ſums provided for the portion of the younger children as ſhould afterwards come to him, ſhould be within the aforeſaid truſts. The ſurplus of the rents and profits of *B.*'s real eſtate, limited for the benefit of his children, after ſome particular proviſions, was, during *B*'s life, decreed to be diſtributed among his children. A bill is filed againſt *A.* by *his* children to have his ſhare of that ſurplus, and any that ſhould be afterwards paid him by order of the court placed out for their benefit, as being compriſed within the truſt of his marriage ſettlement. Held that the plaintiffs had no right or intereſt in the defendant's ſhare of this ſurplus. 1 *Veſ.* 57. *Nov.* 1747. *Vane* v. *Vane.*

9. Marriage articles to ſettle land on huſband and wife, and the heirs of the body of the huſband by the wife. After marriage a ſettlement was made, reciting the articles, and ſaid to be in performance of them, by which the eſtate was conveyed in the words of the articles. Huſband and wife levied a fine, and ſold the eſtate. On a bill by the ſon of the marriage, the court refuſed to carry the articles into execution by a ſtrict ſettlement againſt the purchaſer, who had no notice of them; but the articles not being

being produced, the bill was diſmiſſed. *Amb.* 515. *Feb.* 1766. *Cordwell* v. *Mackrill.*

10. When a tenant-right eſtate ſettled upon marriage is renewed, the renewal is to the uſes of the ſettlement. 1 *Bro. Ch. Rep.* 197. *March* 1783. *Pickering* v. *Vowles.*

11. The teſtator had by ſettlement reſerved an election of conveying certain parcels of land or paying a certain ſum of money: not having elected during his life, and the perſonalty being inadequate to the payment of his debts, the eſtate ſhall be conveyed. 2 *Bro. Ch. Rep.* 5. 1785. *Tyſſen* v. *Benyon.*

12. Marriage articles are not decreed in ſtrict ſettlement where it appeared by a difference in the penning of the limitations, that the parties intended to leave a part in the father's power. 2 *Veſ.* 358. 1751. *Howel* v. *Howel.*

13. Articles on marriage to ſettle eſtates of the huſband and wife of equal value, in ſtrict ſettlement, and providing portions: the wife's eſtate being withdrawn by decree on account of her infancy, the youngeſt children were confined as againſt the eldeſt to half their portion: the articles providing in the event of no iſſue male, in which caſe the eſtates were to ſeparate, that each ſhould bear a moiety; though they alſo contemplated the caſe of the wife's refuſal to be bound, providing againſt it by the forfeiture of her intereſt. 5 *Veſ. jun.* 719. *Feb.* 1800. *Clough* v. *Clough.*

(Q) Agreements. Unperformed, decreed after the Death of Huſband or Wife. 15 Vin. 279.

1. *C.* By articles on his marriage with his firſt wife covenanted, that all the lands which he ſhould purchaſe during his life ſhould deſcend to or be ſettled upon the heirs male of her body by him begotten. No ſettlement was made purſuant to theſe articles; but *C.* having purchaſed lands, ſettled them, upon his marriage with a ſecond wife, to different uſes. Held that the eldeſt and only ſon of the firſt marriage was entitled to a performance of theſe articles; and a conveyance was decreed accordingly. 1 *B. P. C.* 470. 1714. *Cuſack* v. *Cuſack.*

2. Bill by the daughter and only child of the firſt marriage of *J. M.* for a ſpecific performance of articles previous thereto, inſiſting ſhe ought to be tenant in tail of the lands therein mentioned; iſſue in the articles means females as well as males, and conſequently the plaintiff is entitled to have a ſettlement of theſe lands in tail. 3 *Atk.* 371. 1746. *Hart* v. *Middleburſt.*

3. Plaintiffs claimed a reverſion in fee, deſcended to them as co-heireſſes of Lord *S.*, by virtue of a ſettlement made by him in 1687. Lord *E.* claiming under another ſettlement, and recoveries ſuffered; and the deed of 1687 being in the hands of Lady *S.*, ſhe refuſed to deliver it up unleſs her rights were confirmed. Plaintiffs filed a bill of diſcovery. Lady *S.* inſiſted that

on her marriage and bringing 25,000*l.* portion, it was applied to paying off incumbrances, which, when paid, were aſſigned to her, and a jointure made of 1600*l. per ann.*; and that her huſband alſo covenanted to leave her a houſe worth 3000*l.* for life, and if not, that his heirs, executors, *&c.* ſhould pay her the intereſt of 3000*l.* for her life; and then there was a term of 1000 years in truſt, that on his not ſettling ſuch houſe according to his covenant, the truſtees ſhould, out of the rents and profits of the lands compriſed in the term, pay her 150*l. per ann.* for life in ſatisfaction of the covenant. Plaintiffs decreed to confirm this; and after verdict in ejectment, finding that the recoveries were bad, and had not barred the reverſion in fee, the plaintiffs inſiſted on an aſſignment from her of all the mortgages, *&c.* paid off by her portion. Held that the repreſentatives of the perſonal eſtate ſhould not be preferred to the plaintiffs, who muſt be indemnified againſt the 150*l. per ann.* out of the perſonal eſtate, and the ſecurities aſſigned for the plaintiffs. 1 *Veſ.* 30. 1747. *Lord Portſmouth* v. *Lady Suffolk.*

4. On the marriage of a daughter there is an agreement, that the father ſhall immediately pay for her ſeparate uſe 500*l.*, to which ſhe was not entitled unleſs ſhe ſurvived him; and that a real eſtate, which came to her from her mother, ſhould be ſettled after the uſes of the marriage to the father and his heirs; the right heir of the father is entitled to a ſpecific performance of theſe articles. 1 *Veſ.* 73. 1747. *Stephens* v. *Trueman.*

5. The huſband covenants in marriage articles, within ſix months after the death of his mother and that he ſhould come into poſſeſſion of the eſtate in jointure, to ſettle, *&c.* He dies in the mother's lifetime, leaving no iſſue. The eſtate deſcends to his heir; he ſhall not be compelled by the wife to a ſpecific performance. 1 *Veſ.* 256. 1749. *Whitmel* v. *Farrel.*

6. By marriage articles 2000*l.* were to be laid out in land and ſettled in truſt for the huſband and wife for their lives, remainder to ſuch of their iſſue as they ſhould appoint; and in default of appointment, to their iſſue; the huſband died without appointment. Ordered, the ſettlement to be made on the wife for life, remainder to the firſt and other ſons in tail, *&c.* *Amb.* 274. 1755. *Dod* v. *Dod.*

7. A woman before marriage entered into an agreement with the intended huſband, that her property ſhould belong to the ſurvivor for life: this agreement, though without ſeal or ſtamp, will give the huſband an equitable eſtate for life in lands of which ſhe was ſeiſed in reverſion. 2 *Bro. Ch. Ca.* 534. 1789. *Hodſden* v. *Lloyd.*

8. Money to be laid out in land to be ſettled to the huſband for life, remainder to raiſe portions for younger children; the money was afterwards inveſted by direction of the huſband in *South Sea* annuities; afterwards, by will, he deviſes all his manors, *&c.* generally to certain uſes. The money in the funds muſt be laid out in land. 4 *Bro. Ch. Rep.* 333. 1793. *Hickman* v. *Bacon.*

9. Huſband,

9. Husband, under a decree to propose a settlement of stock belonging to his wife, transferred to the accountant-general by order, came to an agreement with her out of court, and while they lived apart, but not legally separated, to take part and give her the rest. This agreement does not bind the wife; and the husband dying before any steps were taken for executing it, the whole survived to the wife. 4 *Ves. jun.* 15. *July* 1798. *Macaulay* v. *Phillips.*

10. If a settlement of the wife's equitable interest had been approved and ordered by the court, it is binding, notwithstanding the death of either party before it is actually made. 4 *Ves. jun.* 19. 1798. *Ibid.*

11. Settlement upon marriage of stock, the property of the wife, in trust from time to time to receive the dividends, and pay them into the hands of the wife, for her sole and separate use, her receipt to be a discharge; after her decease, if the husband should survive, for him for life; and after the decease of the survivor, to transfer the principal among the children, according to her appointment by will. The trustees, with the privity of the wife, sold the stock, and paid the money to the husband, taking his bond of indemnity; he died insolvent. Upon the bill of the widow and children, the fund, having been replaced by the trustees, was transferred to the accountant-general upon the uses of the settlement; the trustees to pay the dividends to the widow from the death of the husband. 4 *Ves. jun.* 129. *August* 1798. *Whistler* v. *Newman.*

(R) Agreements unperformed, decreed *after* the Death of both. 15 Vin. 279.

A Settlement in consideration of marriage, the wife's present fortune and subsequent covenants; one of which was, that the wife's mother should give to the wife or any child equal to what was given to the rest; the mother leaves her a legacy, and by lapse part of the residue comes to her; the wife survives the husband; what he had not reduced into possession goes to her representatives by survivorship, not to his, there being no contract to give him a certain right. 2 *Ves.* 675. 1755. *Garforth* v. *Bradley.*

(S) Agreements. Decreed. How. Where there is a Failure on one Side. 15 Vin. 280.

1. MARRIAGE agreements differ from all others; as soon as the marriage is had, the contract is executed, and cannot be rescinded; the children are equally purchasers under both father and mother, and therefore these agreements cannot be set aside, because it would affect the interests of third persons. 3 *Atk.* 610. 1748. *Harvey* v. *Ashley and others.*

2. All

2. All other agreements are conſidered as entire; and if either party fails in the performance in part, it cannot be decreed in ſpecie; in marriage agreements it is otherwiſe, for though either of the relations of huſband or wife fail in the performance of their part, yet the children may compel a performance. *Ibid.* 2 *Veſ.* 308. *Hylton* v. *Biſcoe.* S. P.

3. If the wife's father agrees to give a portion, and the huſband's father to make a ſettlement, though the former does not give the portion, yet the children may compel a ſettlement. *Ibid.*

4. Where a female infant is married to a man of large eſtate, though the dower be a third, and ſhe has a jointure only of a tenth, yet ſhe ſhall not ſet aſide this ſettlement for inequality between the dower and the jointure. *Ibid.*

5. On marriage agreement to ſettle a jointure in conſideration of a portion to be paid by the wife's father; though the portion were not paid, the ſettlement was decreed to be performed. *Amb.* 502. 1741. *Perkins* v. *Thornton.*

25 Vin. abr. (U) Agreements unperformed. What ſhall be ſaid a Satisfaction.

1. *A.* On his marriage ſettled lands to the uſe of himſelf for life, remainder to his wife for her jointure, remainder to the firſt and other ſons of the marriage in tail male; reſerving to himſelf a power of charging the eſtate with 3000*l.* for younger children, or the payment of debts, and covenanted to lay out 6000*l.* part of the wife's portion, in the purchaſe of lands, to be ſettled to the ſame uſes. The 6000*l.* was not laid out. After the eldeſt ſon of *A.* came of age, it was agreed in conſideration of his advancing 3000*l.* for the purchaſe of a commiſſion in the army for the ſon, to make a new ſettlement more beneficial for the younger children. Accordingly a ſettlement was made, whereby the lands were limited to the former uſes, but *A.* was empowered to charge 3000*l.* for each of his younger children; and his covenant to lay out the 6000*l.* was releaſed. On a bill being filed to ſet aſide this ſubſequent ſettlement, and to have the 6000*l.* laid out purſuant to the covenant, the court diſmiſſed the bill, but without coſts. *Lord Kerry* v. *Lord Fitzmaurice*, 5 *Bro. Par. Ca.* 58. 1752.

2. *A.*, previous to his marriage, covenants to ſecure to his wife an annuity of 1000*l.* a year, iſſuing out of lands, for her jointure and in bar of dower. The marriage is had, and *A.* by his will deviſes to his wife certain parts of his real and perſonal eſtate of conſiderable value; held that ſhe was entitled both to the eſtates deviſed, and to her annuity, and that the one was not intended as a ſatisfaction for the other. *Vol.* 7. *pa.* 12. *Sir Thomas Broughton* v. *Errington.* 1773.

3. To make a deviſe or bequeſt a ſatisfaction for a collateral demand or performance of a prior contract, it muſt be *ejuſdem generis*, and not land for money, or money for land, or muſt at leaſt be of

of ſuch certain and known value and eſtimation, and ſo far of the ſame nature of the thing to be ſatisfied therewith as to appear indiſputably to be equivalent, or ſuperior, not only in groſs value, but in annual income, to the debt or demand, or the thing to be performed. *Vol.* 7. *pa.* 12 *May* 1773. *Broughton* v. *Errington.*

4. *R. B.* on his marriage, ſettled exchequer annuities for ninety-nine years, amounting to 300*l. per annum*, in truſt to himſelf for life, remainder to his wife for life, remainder to his children, in ſuch manner as he ſhould appoint; by the marriage there was only one child, a daughter. *R. B.* deviſed all his real and perſonal eſtate to his wife and her heirs, charged with 10,000*l.* to his daughter, payable at 18. After the death of *R. B.*, the wife makes her will, and gives all her real and perſonal eſtate to her daughter and her heirs; but if ſhe die before ſhe was of age to diſpoſe thereof, then to truſtees to raiſe 6000*l.* for a charity; the reſidue thereof, if the daughter dies unmarried, to the ſiſters of the teſtatrix. The daughter, after the mother's death, marries the plaintiff, has iſſue a daughter, and dies about the age of 20; the plaintiff, as repreſentative to his wife, and in his own right, brings a bill for an account of the real and perſonal eſtate of *R. B.* and wife; the daughter was entitled under the ſettlement to the exchequer annuities, and the deviſe of the 10,000*l.* to her ſhall not be taken to be in ſatisfaction of them. 1 *Atk.* 426. 1737. *Bellaſis* v. *Uthwatt.*

5. Sir *Samuel Garth* having upon his daughter's marriage given a bond to leave 5000*l.* at his death among her younger children, by will creates a term for years in truſt to apply the rents and profits for the maintenance of his daughter's children till 21, and alſo gives his perſonal eſtate in truſt to pay the produce thereof to his wife for life, and after her death to pay 1500*l.* to *A.*, one of the daughters of his daughter, and 3500*l.* among the other younger children of his daughter, as he ſhall appoint, and if no appointment, equally between them at 21 or marriage; and declares the legacy ſhall be in full *ſatisfaction* of the bond: ſhe muſt elect to claim under the will, or under the bond, the one being a ſatisfaction for the other; but the Lord Chancellor ſaid, he would not extend the conſtruction of deviſes in ſatisfaction further than they had gone already, and decreed after-born children to have their ſhare under the bond. 1 *Atk.* 509. 1739. *Graves* v. *Boyle.*

6. A leſs ſum given under a will than under a ſettlement, is not a ſatisfaction of a greater. 2 *Atk.* 57. 1740. *Phipps* v. *Anneſly.*

7. Mr. Juſtice *Tracy* held that the lands of which *J. S.* was ſeiſed in fee, and deviſed to his daughters in tail, not ſuch an eſtate of inheritance as will be a ſatisfaction of the portions for his daughters by the ſecond wife, becauſe they claim theſe lands by purchaſe, and the proviſo in the marriage ſettlement reſtrains the ſatisfaction to lands coming to the daughters by deſcent from their father. 2 *Atk.* 458. 1720. *Lady D. Saville* v. *Sir G. Saville.*

8. A father, adminiſtrator *durante minore ætate* of his daughter, who was executrix and reſiduary legatee of her grandmother's eſtate,

eſtate, agreed when ſhe married with the plaintiff, that he ſhould have 800*l.*, which in the ſettlement is called a portion: Lord *Hardwicke* Chancellor refuſed to decree an account of the grandmother's perſonal eſtate as ſhe had been dead 20 years, but directed that the father's repreſentative ſhould account for his perſonal eſtate as to the 800*l.* only, and intereſt at 4*l. per cent.* from the marriage. 2 *Atk.* 521. 1742. *Wood* v. *Briant.*

9. Where a huſband by a ſettlement before marriage was obliged to do a particular thing for the benefit of the wife, and he did a thing equally ſatisfactory, the court will preſume a ſatisfaction by implication. 2 *Atk.* 632. 1742. *Weyland v. Weyland.*

10. The preſumption of ſatisfaction is ſtronger in the caſe of a deed than of a will, where a bounty is ſuppoſed to be intended. *Ibid.* 634.

11. *W.* on his ſon's marriage, ſettled 5000*l.* old and new annuities on him for life, then on *W.*'s wife for life, remainder to his ſon for life, with remainder to his intended wife for life, with remainder to the iſſue of the marriage; not only ſo much as his eſtate for life in theſe annuities is valued at, but the whole 5000*l.* muſt be brought into hotchpot before the ſon can be admitted to a ſhare of *W.*'s perſonal eſtate, who died inteſtate. *Ibid.* 635.

12. Covenant by deed after marriage to ſettle on the wife, if ſhe ſurvive, part of the real eſtate for her jointure, and in full recompence of all dower and thirds which ſhe can any way claim out of any lands of which he is or can be ſeiſed of freehold of inheritance, ſhe is thereby barred from claiming as her *freebench* copyhold purchaſed afterwards. 1 *Veſ.* 54. 1747. *Walker* v. *Walker.*

13. Whether the heir at law is entitled to performance of a covenant in marriage articles to purchaſe and ſettle lands, and how far the covenant was ſatisfied: *the cauſe was compromiſed.* 1 *Veſ.* 274. 1749. *Lewis* v. *Hill.*

14. *A.* agrees to ſettle 100*l. per ann.* on his intended wife, but falling ſick, he deviſes 100*l. per ann.* to her; recovering, marries her and the ſettlement is carried into execution. She can take but 100*l.* 1 *Veſ.* 323. 1749. *Maſcall* v. *Maſcall.*

15. Deviſe of a reſidue of real and perſonal for life not a ſatisfaction for a ſum to be laid out in lands in fee by articles. 2 *Veſ.* 37. 1750. *Alleyn* v. *Alleyn.*

16. Lands deviſed to wife, not a ſatisfaction of a covenant in marriage articles, that lands ſettled on her, were of ſuch a value. 2 *Veſ.* 409. 1752. *Serjt. Prime* v. *Stebbing.*

17. Bill by plaintiff for a performance of articles entered into by his father, *Richard Pinnell*, deceaſed, before marriage, by which he was to purchaſe and ſettle on his wife, and the iſſue male of the marriage, lands of inheritance of the clear yearly value of 500*l.* The father afterwards purchaſed ſome eſtates, and by will, not duly atteſted, reciting the marriage articles, directed lands of the yearly value of 190*l.* to be bought, which, together with

with his eſtate at *Mitcham*, let on leaſe at 180*l.* a-year, the moiety of a houſe in *Idol-lane*, and his copyhold eſtate called *Marlford Farm*, &c. he bequeathed to his wife, without impeachment of waſte, remainder to the uſes of the articles. Queſtion, Whether all or which of theſe eſtates are applicable in part ſatisfaction to the covenant? The Lord Chancellor was of opinion, that the moiety of the houſe was not, becauſe it was not the kind of eſtate mentioned in the articles; 2dly, that the copyhold eſtate was not applicable, becauſe the wife was to take the eſtates ſettled for life *without impeachment of waſte*. And with reſpect to the *Mitcham* eſtate, the rent of which had fallen to 150*l.* a-year, an inquiry was directed as to the yearly value of that eſtate at the death of the teſtator, at which time it became a ſatisfaction *pro tanto*; but if it had been purchaſed at the time of the marriage articles, the value ſhould have been taken as at that time. *Ambl.* 106. 1751. *Pinnell* v. *Hallett and others*, 2 *Veſ.* 276. S. C.

18. Declaration in a deed of ſettlement providing portions for daughters, that if any lands ſhould come from the father, they ſhould be taken as part of the portions; an eſtate tail being deviſed by the father, was conſidered as a part ſatisfaction according to the value of it. *Watſon and another* v. *Earl of Lincoln and others*, *Ambl.* 328. 1756.

19. A proviſion by marriage ſettlement, with a proviſo, that ſums advanced ſhould go in ſatisfaction, unleſs otherwiſe declared; 4000*l.* left by will, ſubject to the life of the mother, and the reſidue of the perſonal eſtate being given by the will to a child entitled to the proviſion under the ſettlement, muſt go in ſatisfaction of that proviſion. *Richman* v. *Morgan*, 1779. 1 *Bro. Ch. Ca.* 63.—Vide 2 *Bro. Ch. Ca.* 394.; *Watſon* v. *Lord Sondes*, and *Pugh* v. *the Duke of Leeds*, *March* 1780. 1 *Bro. Ch. Ca.* 66. *in notis.*

20. By marriage ſettlement, part of the wife's fortune was advanced to the huſband for the purpoſes of his trade, for which he ſecured her an annuity, the reſt being ſettled upon the children after the deceaſe of the huſband and wife, in ſuch proportions as the wife ſhall direct: by will he directed, that the wife ſhould relinquiſh her claim under the ſettlement, and left a larger ſum to truſtees, the intereſt to be paid to her while ſole, with a power to her to diſpoſe of the whole among the children. This is a ſatisfaction for their portions under the ſettlement. 1 *Bro. Ch. Ca.* 82. 1780. *Moulſon* v. *Moulſon.*

21. Bond on marriage to ſecure 300*l.* (the wife's fortune) to the wife, within one month after the huſband's deceaſe, by will the huſband gave her 500*l.* payable within ſix months after his deceaſe, together with other legacies. The bequeſt of 500*l.* is not a ſatisfaction for the 300*l.* ſecured by the bond. *Haynes* v. *Mico*, *Mich.* 1781. 1 *Bro. Ch. Ca.* 129.—Vide *Cantle* v. *Morris*, *ib.* 133. *in notis.*

22. By a marriage ſettlement 10,000*l.* were to be raiſed for younger children; the ſettlor by will gave the younger children

2000*l.* each; this is a part satisfaction. 1 *Bro. Ch. Ca.* 305. *Warren* v. *Warren.* *July* 1783.

23. Leasehold estate settled "in lieu of dower," is not a bar of thirds. 3 *Bro. Ch. Rep.* 362. 1791. *Creswell* v. *Lord Byron.*

24. A covenant is satisfied by suffering property to go so as to produce the same effect; thus lands suffered to descend are a satisfaction of a covenant to purchase. 2 *Ves. jun.* 356. 1794. *Wilson* v. *Piggot.*

25. Covenant in marriage articles by the husband to pay his wife, if she should survive, 200*l.* as a jointure, and 50*l.* to provide herself with a house yearly for life: afterwards by will he gave her for life an estate and house above the value of 100*l.* a-year, with the household goods, *&c.* and an annuity of 100*l.*, commencing and payable at different times from those in the articles. Held not a performance, nor intended as a satisfaction. 2 *Ves. jun.* 463. 1794. *Richardson* v. *Elphinstone.*

26. Covenant to leave a sum of money, which is not done, but personal estate is permitted to descend, so that an equal or greater sum would go according to the covenant. This is a performance. *Ibid.* 464.

27. Portions for children by the will of the parent presumed a satisfaction of a prior provision by settlement, unless clearly not so intended: the presumption is not rebutted by slight circumstances. 3 *Ves. jun.* 516. *Hinchliffe* v. *Hinchliffe.* *Aug.* 1797.

28. Portions for children by the will of the parent held a satisfaction of a provision by settlement, upon the intention: slight circumstances of difference, that would repel the presumption of satisfaction between strangers, are not sufficient in the case of parent and child. 3 *Ves. jun.* 530. *Sparkes* v. *Cator.* *Aug.* 1797.

29. Settlement previous to marriage of the wife's fortune on herself, with a covenant by the husband, in consideration of the marriage, *&c.* and for making some provision for the wife and her issue, to pay within three months after his death 6000*l.* to the trustees in trust, if the wife should survive him, and there should be no issue, (which was the event) to pay 1500*l.* to the wife, her executors, *&c.*, and to pay the interest of the remaining 4500*l.* to her for life: she is entitled to dower; and her share under the statute of distributions is not a satisfaction or performance of the covenant. 4 *Ves. jun.* 391. *Couch* v. *Stratton.* *Jan.* 1799.

15 Vin. 232. (W) Agreements unperformed decreed upon what Evidence.

1. COVENANT by deed before marriage to settle on the wife, if she survive, part of the real estate for her jointure, and in full recompence of all dower or thirds which she can any way claim out of any lands of which he is or shall be seised of freehold of inheritance, she is thereby barred from claiming as her *free*

bench

bench copyhold purchaſed afterwards. 1 *Veſ.* 54. 1747. *Walker* v. *Walker*.

2. Query, Whether an heir at law is entitled to performance of a covenant in marriage articles to purchaſe and ſettle lands, and how far the covenant is ſatisfied. 2 *Veſ.* 274. 1749. *Lewis* v. *Hill*.

3. *A.* on marriage covenants to buy land of the clear yearly value of 500*l.* and ſettle; and by his will he directs that a moiety of a houſe and a copyhold eſtate ſhould be taken as part: held they ſhould not, on bill for the performance of the articles. *Ambl.* 106. 1752. *Pinnell* v. *Hallett*.

4. Lands by will directed to be taken as part performance of covenant to ſettle, having ſunk in their value, ordered to be taken at the rents as they ſtood at the teſtator's death. *Ibid.*

5. If a ſettlement be juſt in general, a particular advantage on one ſide or the other will not affect it. 2 *Atk.* 520. 1742. *Middlecome* v. *Marlow*.

6. Informal marriage agreements decreed notwithſtanding the ſtatute of frauds upon acquieſcence and acts in conſequence, though not ſigned by one party, or though an infant. 2 *Veſ.* 524. 1754. *Archer* v. *Pope*.

7. Leaſehold eſtate ſettled "in lieu of dower" is not a bar of thirds. 3 *Bro. Ch. Ca.* 362. 1791. *Creſwell* v. *Byron*.

8. Settlement decreed according to a letter previous to the marriage, though no expreſs aſſent: the marriage having taken place immediately, a diſtinct, poſitive diſſent would be neceſſary to prevent the effect of the letter; and that could be evidenced only by an actual ſettlement before marriage. Conſtruction as to veſting in what children and when; and as to the ſubject upon which the ſettlement was intended to attach. 4 *Veſ. jun.* 501. 5 *Veſ. jun.* 213. S. C. 1799. *Luders* v. *Anſley*.

9. Articles before marriage for ſettling real eſtates of the huſband, and alſo all and ſingular his perſonal eſtate of what nature or kind ſoever; a proper execution would be by a covenant that real eſtate that ſhould be purchaſed with the perſonal ſhould, with reſpect to the objects of the ſettlement, be conſidered perſonal: the ſettlement therefore made after marriage containing no ſuch covenant, and being in other reſpects a defective execution, real eſtates purchaſed by the huſband, according to the evidence in order to defeat the right of his wife, were decreed to be conveyed by his deviſee according to the articles. A gift by him in his life in conſideration of ſervice was not diſputed; but under the particular circumſtances attending the marriage, and in the caſe of an infant, the court appeared to queſtion its validity. 5 *Veſ. jun.* 262. 1800. *Randall* v. *Willis*. See alſo 1 *Fonbl. Treat. Eq.* 200.

11 Vin. 285. (X) Agreements decreed. How as to the Limitations, &c. to be made upon.

1. SON not in being cannot take leſs than an eſtate tail. 2 *Veſ.* 568. 1754. *Hucks* v. *Hucks.*

2. In marriage articles a limitation to the firſt ſon and to the firſt ſon of ſuch firſt ſon, is an eſtate tail to the firſt ſon. *Ibid.*

3. Settlement to ſuch uſes as the huſband and wife ſhall jointly appoint, and in default of ſuch appointment to them for life; and after the deceaſe of the ſurvivor to the uſe of all or any of the child or children of them, in ſuch ſhares and proportions, and for ſuch eſtate and eſtates, term or terms, and payable at ſuch time or times and in ſuch manner and form as the huſband ſhould by deed or will appoint, and in default thereof to him and his heirs. The event, upon which the laſt limitation depends, is default of appointment, not of children. 5 *Veſ. jun.* 596. 1800. *Barſlow* v. *Kelvington.*

4. Sir *Robert Fagg* and his ſon *Robert*, by articles made on the marriage of the ſon, covenanted for themſelves, their heirs, executors, *&c.* to ſettle lands to the following uſes: as to one part of the value of 820*l. per annum* to the ſon for life, and after the determination of that eſtate to raiſe a jointure of 400*l.* a-year rent-charge for the wife, and then to truſtees to preſerve contingent remainders to ſons in tail male, afterwards to ſons by any other marriage, and there was no other limitation; then as to other part of the eſtate, the uſes of which were limited to the ſame perſons as the firſt mentioned lands, with a charge by way of additional portion of 4000*l* for Sir *Robert Fagg*'s daughters, and after ſeveral limitations, "*to the plaintiff Lady* Goring *and her heirs male, unleſs* "*Sir* Robert Fagg *ſhould appoint other uſes under his hand and ſeal,* "*then a limitation to other daughters in tail; then to Mr.* Fagg *of* "Grimſby, *and then to Sir* Robert's *right heirs.*" The father died, leaving the ſon ſurviving, the ſon died without having carried the articles into execution, the legal eſtate in ſome of the lands deſcended on the four ſiſters in fee as heirs both of the father and brother; Sir *Charles Goring* and his lady, one of the daughters of Sir *Robert Fagg*, filed a bill to have the articles carried into execution, and to have the entail of the eſtate ſo limited as aforeſaid, ſettled accordingly: and the court decreed the ſame. 3 *Atk.* 186. 1744. *Goring* v. *Naſh.*

5. A ſpecific performance of marriage articles has been decreed even as to collaterals. *Ibid.* 189.

(Y) Agreements decreed how; upon Limitations contained in the Covenant. 11 Vin. 286.

1. COVENANT by husband to assign a contingent portion of the wife to the uses of the marriage. The right of calling for it vests in the husband, who dies without doing so. The wife is bound by this covenant. 1 *Ves.* 19. 1747. *Bush* v. *Dalway.*

2. Covenant in an infant's marriage settlement, that whatever should come to the wife from the mother or otherwise shall be bound by the settlement restrained to what shall come from the mother, not to property coming unexpectedly from other quarters. To bind an infant the marriage settlement must be fair and reasonable, not tend to deprive her of every thing. 1 *Br. Ch. Ca.* 152. 1782. *Williams* v. *Williams.*

3. Covenant in a marriage settlement to settle leasehold estates in trust for such persons, and such or the like estates, ends, intents, and purposes, as far as the law would allow as declared concerning real estates, limited to the first and other sons in tail male, with several remainders: the court, in executing the covenant, declared that no person should be entitled to the absolute property unless he should attain twenty-one, or die under that age leaving issue male. 3 *Ves. jun.* 387. 1797. *The Duke of Newcastle* v. *The Countess of Lincoln.*

(Z) Settlement Construction, how much. 11 Vin. 287.

1. UNDER marriage articles 2000*l.*, part of 3000*l.* vested in trustees, is to be paid to such son as shall live to attain the age of 21, when and at such time as he shall have attained his age of 23: held that he became absolutely entitled to the money, and the time of payment only was postponed to the age of 23. 2 *Atk.* 185. 1741. *Combe* v. *Combe.*

2. By articles made on the marriage of plaintiff's father and mother, it was agreed that the sum of 1000*l.* should be paid to a trustee, and the sum of 300*l.* secured to him in trust, to permit the plaintiff's father to receive the interest and dividends for his life, and after his death to permit the wife to receive the interest thereof for her life; and after the death of the survivor, if they should have a son, or one or more younger children, sons or daughters, then upon trust *to pay the said principal sums to such younger children, if but one, if more, then to be equally divided between them*; and it was covenanted that the plaintiff's grandfather should procure his sister *Frances Flatman* to convey all her interest in certain houses to the use of herself for life, to plaintiff's mother for life, then to her younger child or children in tail general, remainder to the plaintiff's mother in fee. By lease and release,

bearing even date with the articles, the ſaid houſes were ſettled to the ſame uſes with the articles. The father and mother died, leaving the plaintiff their daughter and *eldeſt* child, and alſo a ſon: the plaintiff is entitled to the ſaid ſums of 1000*l.* and 300*l.*, and alſo to the ſaid houſes, the rule being, that where there is a ſon an eldeſt daughter is conſidered as a younger child, which was the intention of the parties, the articles and the releaſe being taken together. 2 *Atk.* 456. 1742. *Heneage* v. *Huntlockr.*

3. *Elizabeth Burnaby*, by an agreement made on her father and mother's marriage, was entitled to 6000*l.* Mr. *Burnaby*, juſt before his marriage, ſigned a paper whereby he agreed that every thing which ſhould come to *Elizabeth* by her father's death, ſhould go to them for their reſpective lives, and after the death of the ſurvivor to the heirs of the body of *Elizabeth* by him begotten; as this was a limitation to the heirs of the wife, it veſted in her only, and the huſband conſenting, the court decreed the 6000*l.* to be ſettled on her and her children. 2 *Atk.* 474. 1742. *Green* v. *Ekins.*

4. An eſtate was limited under a ſettlement to the father for life, then to ſecure a rent-charge of 800*l. per annum* to his wife for life, remainder to truſtees during the life of the father to preſerve contingent remainders, remainder to the firſt and every other ſon of *J. S.*, remainder to the brother of *J. S.* The plaintiff was born after the next rent day had arrived after the death of *J. S.* his father, and was held entitled under the 10 and 11 of *W.* 3. to the intermediate profits of the lands ſettled as well as to the lands themſelves. But as to deſcended eſtates, the poſthumous child held entitled to the profits from his birth only. *Baſſet* v. *Baſſet*, *December* 1744. 3 *Atk.* 203.

5. Limitation in a ſettlement "*to the uſe of all and every child* "*and children other than ſuch as ſhall be heir at law*," if there had been only one child it would have been excluded, if there had been ſeveral daughters they would have been excluded, or if there had been ſeveral ſons and daughters, and reduced only to one child, that child could not have taken. 3 *Atk.* 338. 1745. *Lord Townſhend* v. *Aſh.*

6. A poſthumous child is within a proviſion in marriage articles for ſuch children of the marriage as ſhould be living at the death of the father or mother. 1 *Veſ.* 85. 1747-8. *Millar* v. *Turner.*

7. When the iſſue of the marriage is not entitled to have the eſtate ſettled on the marriage, diſencumbered out of their father's eſtate. 1 *Veſ.* 100. 1748. *Clack* v. *Samſon.*

8. On marriage, a leaſehold eſtate was ſettled in truſt for the huſband and wife for life; after the deceaſe of the ſurvivor, then to truſtees, to aſſign it with the rents and profits to the eldeſt ſon: for want of ſuch iſſue of ſuch ſon or daughters, it goes to the only daughter on the mother's death, and not to the repreſentatives of a ſon, who died without iſſue in the mother's lifetime. 2 *Veſ.* 118 *and* 318., *Exel* v. *Wallace.*

9. Settlement

9. Settlement of 10,000*l.*, the intereſt to be paid to huſband and wife for their lives, the principal ſubject to the appointment of the huſband, and then of the wife to any of the children; and in default of appointment, to all their children equally at 21, or marriage; there were two children, one died in the lifetime of the father; there was no appointment; the father died: held to be a contingent veſted intereſt in the children, and the ſurvivor was entitled to the whole after the death of the mother. *Ambl.* 364. 1758. *Gordon* v. *Levi.*

10. Settlement of money on huſband and wife, *&c.* and if the huſband die, and the wife ſurvive, he leaving no iſſue of her body, or ſuch iſſue die in the lifetime of the wife, then the money to go to the wife; there was iſſue a daughter, who attained 21, and died in the lifetime of her mother: held the daughter took a veſted intereſt. *Ambl.* 621. 1764. *Heurtley* v. *Maſon.*

11. Truſt under marriage ſettlement for the next of kin of the wife, ſubject to her appointment by will with two witneſſes: appointment in favour of the huſband by an unatteſted will being void, the children are entitled, not the huſband, who is not of kin to his wife, and whoſe claim to her perſonal property is not in that character under the ſtatute, but *jure mariti*: and in this caſe according to the plan of the ſettlement, he was not intended. 3 *Veſ. jun.* 244. 1796. *Watt* v. *Watt.*

(B. a) Lien. Where the Covenant is a Lien on the Land. 11 Vin. 228.

1. *A.* Covenants on his marriage to lay out 3000*l.* in the purchaſe of land, and to ſettle it on *A.* in tail, remainder to *B.* *A.* purchaſes the manor of *D.* with this 3000*l.* and never ſettles it, but ſuffers a recovery thereof; as the covenant was a lien on the land; ſo the recovery ſuffered of it diſcharges the lien, and bars *B.* of the benefit of the covenant, and of the remainder. 3 *P. Wms.* 171. 1732. *Marwood* v. *Turner.*

2. *N.*, the mother of *A. S.*, was ſeiſed in tail *ex proviſione viri* of the eſtate in queſtion, reverſion in fee to her huſband; *A. S.* and *W. S.* her huſband created a mortgage term of 1000 years on his eſtate, and joined in levying a fine to the mortgagee, remainder to ſuch uſes as *W. S.* ſhould appoint. *W. S.* before the levying the fine, on ſale of an eſtate belonging to him, covenants with *J. S.* the purchaſer for quiet enjoyment, and afterwards makes an appointment to truſtees for particular purpoſes of the wife's eſtate; *J. S.* being evicted of the lands he purchaſed, brings his bill againſt *A. S.* and her four children, to ſubject her eſtate to the plaintiff's demand under the covenant of *W. S.* It being a doubtful caſe whether the plaintiff's debt accrued by breach of covenant till after the appointment of *W. S.* in execution of the power, the bill was diſmiſſed. 3 *Atk.* 410. 1746. *White* v. *Sanſom.*

3. A covenant to appropriate one-third of the produce of a real eſtate to raiſe a ſum of money, is not a mere perſonal covenant ſuable at law, but creates a lien upon the land, and the covenantees are entitled to have it ſpecifically performed. *Legard* v. *Hodges*, *Eaſt.* 1792. 2 *Bro. Ch. Ca.* 531. 1 *Veſ. jun.* 477. S. C. *Auguſt* 1793. 4 *Bro. Ch. Ca.* 421. S. C.

4. A covenant to ſettle or convey particular lands will not at law create a lien upon the lands; but in equity ſuch a covenant, if for a valuable conſideration, will be deemed a ſpecific lien on the lands, and decreed againſt all perſons claiming under the covenantor, except purchaſers for valuable conſideration, and without notice of ſuch covenant. *Finch* v. *Earl of Winchelſea*, 1 *P. Wms.* 282. *Freemantle* v. *Dedire*, 1 *P. Wms.* 429. *Jackſon* v. *Jackſon*, 4 *Bro. Ch. Rep.* 462. *Coventry* v. *Coventry*, beſt reported at the end of *Francis's Maxims*; for equity conſiders that as done, which being diſtinctly agreed to be done, ought to have been done. *Grounds and Rudiments of Law and Eq. page* 76. *and Fonbl. Treat. Eq.* 367.

11 Vin 290.

(C. a) Covenants Lien on the perſonal Eſtate.

1. *A.* Covenants for himſelf and his heirs, that he will purchaſe lands and ſettle them on himſelf for life, remainder to his wife for life, remainder to his firſt, *&c.* ſon, remainder to himſelf in fee; equity will compel the executor to lay out the money, though the heir is both debtor and creditor. 3 *P. Wms.* 224. 1733. *Lechmere* v. *Earl of Carliſle.*

2. Bond by an infant for a juſt debt: his mother and infant ſiſter being entitled, on the death of *A.* without iſſue, to 4000*l.* ſtock for the mother for life, after to her children according to appointment, if no children to the mother, after the death of the ſon covenant to pay that debt, when either ſhould become entitled to that ſtock. On the marriage of the daughter, the mother made an appointment of the ſtock in her favour; but the next day the huſband having notice of, and approving the covenants to pay the ſon's debt, and reciting his, and his wife's intention to ſecure it "as after mentioned," releaſed all their right to that ſtock to the mother, and covenanted that when the wife ſhould be 21 all their intereſt ſhould be veſted in her; and a truſt was declared, that if the obligee ſhould have a right to recover that debt, it ſhould be paid out of that ſtock. Afterwards a bill being filed to ſet aſide the ſettlement, as an appointment by the mother for her own benefit without conſideration, the parties were by agreement mutually releaſed from the covenants in it, and the huſband covenanted that if the obligee ſhould have a right in the life of the mother to recover the debt, it ſhould be paid out of that ſtock. The mother died inteſtate before *A.* It was held that a fair aſſignee of the debt had no ſpecific lien on the fund, which could be

be liable only by being brought back into the mother's aſſets as taken out in fraud of her creditors; for which it muſt be ſaid either that there was no pretence for the compromiſe, or no pretence for its providing for the debt only if ſuable in the mother's life; but the marriage brocage in the ſettlement was ſufficient ground for the compromiſe, and the bill did not go on the other ground; therefore the common decree for an account of aſſets, debts, and funeral expences, without reference to that fund, was made againſt the huſband and wife as adminiſtrators. The debt of the ſon was a ſufficient conſideration for the covenants; and if the mother had ſurvived *A.* there would have been a ſpecifick lien. 1 *Veſ. jun.* 314. 1791. *Johnſon* v. *Boyfield.*

(D. a) Portions to be paid, or Settlements *to be* made on Condition precedent. 15 Vin. 291.

SETTLEMENT on two daughters; proviſo, if either marry without the conſent of their mother, it ſhould be to their ſeparate uſe, *&c.*; the mother propoſed, and encouraged the marriage of one of her daughters with Lord *Strange*, and afterwards refuſed her conſent out of *pique* and reſentment; the marriage was had without her conſent, and held no forfeiture. *Ambl.* 263. 1755. *Lord Strange* v. *Smith.*

(E. a) Settlement. *Variance* between Agreements, Articles, and Settlements. 15 Vin. 293.

1. WHERE by articles an eſtate is limited to *A.* for life, to his wife for life, remainder to the heirs of the body of *A.*: this is conſidered here as an eſtate for life only in the father, and the ſettlement after ſhall be rectified by the articles before marriage; but though this has been done between parties to the articles and ſettlement and their repreſentatives, and *mere* volunteers, yet not againſt a purchaſer. 3 *Atk.* 291. 1745. *Warwick* v. *Warwick.* 1 Atk. 17. 2 Atk. 85.

2. Articles and ſettlement in purſuance, and in the very words thereof, both before marriage, under which the huſband would be tenant in tail, will be rectified in this court for the ſon. 1 *Veſ.* 238. 1749. *Roberts* v. *Kingſby.*

3. The court refuſed to rectify a ſettlement which varied the intereſt of an adult from what it appeared to be under the articles. *Ambl.* 315. 1756. *Partyn* v. *Roberts.*

4. Articles before marriage to ſettle were ſo expreſſed, that the huſband would have had an eſtate tail; a ſettlement copying the very words of the articles was reformed. 5 *Veſ. jun.* 262. 1800. *Mandall* v. *Willis.*

5. Set-

5. Settlement reformed in favour of the younger children, againſt the heir of the mother, claiming the reverſion, by a letter from her on the marriage of her daughter, ſtating the intention. 5 *Veſ. jun.* 593. *Aug.* 1800. *Barſlow* v. *Kelvington.*

Maſter of the Rolls.

(A) His Power, &c.

15 Vin. 349.

HIS Honor directed a caſe to the Court of King's Bench, ſaying he thought he had authority when ſitting for the Chancellor, which was the caſe then, though not when ſitting at the Rolls. 2 *Bro.* 88. 1786. *Horton* v. *Whitaker.*

Maſter of a Ship.

(B) *Chargeable.* In what Caſes.

15 Vin. 344.

1 WHERE ſeveral bills of lading, of different imports, have been ſigned, no reference is to be had to the time when they were ſigned by the captain; but the perſon, who firſt gets one of them by a legal title from the owner or ſhipper, has a right to the conſignment. And where ſuch bills of lading, though different upon the face of them, are conſtructively the ſame, and the captain has acted *bonâ fide*, a delivery according to ſuch legal title will diſcharge him from them all. *Caldwell et al.* v. *Ball*, 1 *Term Rep.* 205.

2. Where goods are ordered for a ſhip by the owners, before the appointment of the captain, though ſome are not delivered till afterwards, yet as no perſonal credit is given to the captain, he is not anſwerable for any of them. *Farmer* v. *Davies*, 1 *Term Rep.* 108. *Vide* alſo *Hoſkins* v. *Slayton*, *Caſ. Temp. Hard.* 376.

3. The perſon who repairs a ſhip has his election in a court of common law, either to ſue the maſter who employs him, or the owners, but if he undertakes it on a ſpecial promiſe from either, the other is diſcharged. *Garnham* v. *Bennett*, 2 *Str.* 816.

4. The demand in Chancery was for work done in repairing a ſhip. The defendants were part owners, or their repreſentatives, who received the benefit thereof. *Per* Lord *Hardwicke*, C. The

queſtions are two; firſt, whether the part owners, by the employment of the plaintiff either by the maſter or the huſband, are become perſonally liable for the debt created and contracted for the repairs? 2d, whether, ſuppoſing they are not, the ſhip itſelf has contracted a lien by the admiralty law allowed here; and then, whether the money ariſing by the ſale is anſwerable to the plaintiff? Upon the laſt queſtion, his lordſhip ſaid, certainly, by the maritime law the maſter has power to hypothecate both ſhip and cargo for repairs, *&c.* during the voyage, which ariſes from his authority as maſter, and the neceſſity thereof during the voyage; without which both ſhip and cargo would periſh: therefore both that and the law of this country admit ſuch a power. But it is different when the ſhip is in port *infra corpus comitatus*, and the contract for repairs, *&c.* made in *England*, then the rule of that law muſt prevail. I know of no caſe where the repairs, *&c.* whether it was by part owners or ſole owners, maſter or huſband, have been held a charge or lien on the body of the ſhip, *Watkinſon* v. *Barnard*, 2 *P. Wms.* 367. being a direct authority to the contrary; and if the ſhip in the river *infra corpus comitatus* ſhould be proceeded againſt for ſuch debts, the courts of law would iſſue a prohibition, the contract being at land, and not ariſing from neceſſity. If, therefore, the body of the ſhip is not liable or hypothecated, how can the money ariſing by ſale be affected or followed, the one being conſequential of the other? He diſmiſſed the bill therefore ſo far as it ſought relief againſt the body of the ſhip, or the money ariſing by the ſale thereof; but feeling doubts on the other point, he directed that the plaintiff be at liberty to bring an action againſt the ſurvivors, and reſtrained the defendants from pleading the ſtatute of limitations, or from inſiſting upon any diſcharge under a commiſſion of bankruptcy againſt one of them. *Buxton* v. *Snee*, 1 *Veſ.* 154.

5. But a maſter having pledged a ſhip for the expences, *&c.* laid out upon her abroad, the queſtion was, whether the part owners were liable? and *Thomas* v. *Terry*, *Eq. Ab.* 139., *Speering* v. *Degrave*, 2 *Vern.* 643. were cited. Sir *John Strange*, Maſter of the Rolls, obſerved that the caſe in *Vern.* ſeemed to be a tranſaction at home, and it was common that if materials were furniſhed by tradeſmen, they might bring an action againſt either *. But his Honor, after taking time to conſider, determined that the ſhip was well hypothecated, and that part owners were liable. *Sanſum* v. *Bragington*, 1 *Veſ.* 443.

* *Quere.* Whether the ſhip or captain is meant hereby as liable, as the owner, &c. is in the other. See the diſtinction taken in the following caſe.

(B. 2) *Owners.* How far bound by his Contract or Default. 15 Vin. 348.

1. WHOEVER ſupplies a ſhip with neceſſaries has a *treble* ſecurity. 1. The perſon of the maſter, as making the contract. 2. The ſpecific ſhip. 3. The perſonal ſecurity of the owners,

Note, But in Weſterdale v. Dale, 7 Term Rep.

owners, whether they know of the supply or not, for they are liable for the master's act, because they chuse him. *Per* Lord *Mansfield* C. J. *Rich* v. *Coe et al.*, *Cowp.* 639. *Farmer* v. *Davies*, 1 *Term Rep.* 108.

B. R. 312. Lord Kenyon C. J. said, "I doubt whether that doctrine is not too generally laid down." Sir J. Jekyll held in a case before him, that the master could not subject the ship if in England; and that was confirmed by Lord Hardwicke.

2. Though the *master* of a vessel be also *lessee* of it, by agreement with the *owners for a term of years*, under covenants on *their* part that he shall have the *sole management* of the ship, and employ her for his own *sole benefit*, &c., and on *his* part, that he shall *repair* her at his *own sole cost and charge*, &c. The owners are still liable for *necessaries* furnished for the ship by order of the master, though without their knowledge; or without their being known to the person who supplied them. *Rich, Executor*, v. *Coe et al.*, *Cowp.* 636.

3. In trover for a quantity of dollars shipped by the plaintiff on board defendant's vessel, and taken by force by fresh water pirates from on board the ship as she lay at anchor in the *Thames*. Evidence being given that one of the mariners was accessary to the robbery by giving intelligence, and afterwards shared in the spoil, the court of *B. R.* were of opinion that the owners of the ship were not liable for more than the value of the ship and freight under 7 *G.* 2. *c.* 15. *Sutton* v. *Mitchell*, 1 *Term Rep.* 18.

4. In the case of a ransom bill the owners are not liable beyond the value of the ship and cargo. *Hetty* v. *Grant*, cited 1 *Term Rep.* 76.

See 6 Mod. 11.

5. A promise by a captain of a ship on the part of his owners when the ship was taken to pay monthly wages to one of the sailors, in order to induce him to become an hostage, is binding on the owners though they abandon the ship and cargo. *Yates* v. *Hall*, 1 *Term Rep.* 73.

6. The owner of the ship is liable to the freighter for the default of the master, though the freight was to go to the master, either by special agreement of the owner or by the custom of the trade, and though it were in a trade unlawful in the foreign country whence the goods were shipped, but lawful in *England*. *Boucher* v. *Lawson*, *Cas. Temp. Hard.* 85. 194.

7. But it must be charged upon the custom of the realm, as in a ship usually carrying for hire, or on the personal undertaking of the owner; and in a special verdict this must be specially found; upon a general verdict it is presumed. *Ib.*

8. *A.*, the owner of a ship, lets it to *B.* for a voyage for a sum certain, *B.* to have the benefit of carrying goods, and *A.* covenants for the condition of the ship and the behaviour of the master, *C.* sends gold and has bills of lading signed by the master, *A.* is liable and not *B.* *Parish* v. *Crawford*, *Str.* 1251.

(D) Actions againſt him.

15 Vin. 348.

TROVER by the aſſignees of a bankrupt for a ſhip of which the bankrupt was owner, againſt the captain. The defence ſet up was that the captain had a *lien* on the ſhip for his wages, and for ſtores, proviſions, and repairs done in *England*, and paid for by him after the demand by the aſſignees. A verdict being found for the defendant, the court were of opinion upon a caſe reſerved, that it was clear the captain had no lien for his wages; and though he had made himſelf liable to the different tradeſmen for repairs, &c., and might hypothecate the ſhip for them in foreign ports, yet he had no *lien* for them upon it when they were done in *England*; for he need not have made himſelf liable, and would, not if he had profeſſed to act as agent for the owner; and he cannot now be in a better ſituation by paying than the tradeſmen whom he paid, and who had no *lien* for *proviſions furniſhed*; and if they had one for *repairs*, had parted with it by parting with the poſſeſſion of the ſhip. *Wilkins & al. Aſſignees of Brooke* v. *Carmichael*, *Dougl.* 97.

Maſter and Servant. [A]

(A) With reſpect to others.

15 Vin. 308.

1. WHERE the defendant, after the bankruptcy of *A. B.* laid out part of the property of the bankrupt in buying *India* bonds, and delivered them to the wife of the bankrupt; the aſſignees having ſeized part of the bonds thereby confirmed his act as agent for the eſtate, and cannot afterwards ſue him for the money with which the other bonds were purchaſed. *Wilſon* v. *Poulter*, 2 *Stra.* 859.

2. It was held by *Lee*, Ch. J. that though a factor has power to ſell, and thereby bind his principal, yet he cannot bind or affect the property of the goods by pledging them as a ſecurity for his own debt, though there is the formality of a bill of parcels and a receipt. *Paterſon* v. *Taſh*, 2 *Str.* 1178.

3. Where, by the cuſtom of a trade, the factor was reſponſible to the owner for the payment by the vendee, the jury thought that the vendee was not liable to be ſued by the owner, but only by the factor. Their verdict was ſet aſide; but a ſecond being given to the ſame effect (though contrary to the directions of the Judge,) ſeems to have been acquieſced in. *Scrimſhire* v. *Alderton*, 2 *Str.* 1182.

4. Where

See tit. *Bill of Lading.*

4. Where money was paid to an agent by miſtake, and placed by him to the account of his principal, and a balance ſtruck thereupon, but the money *not paid over*, nor any new credit given by him in conſequence thereof till after notice of the miſtake, the agent was held liable to an action for money had and received to the uſe of the perſon paying it. *Buller* v. *Harriſon*, *Cowp.* 565.

See tit. *paſſim.*

5. Where the defendant, as agent for the crown, had employed the plaintiff in public ſervices, he was held not to be perſonally reſponſible. *Macleoth* v. *Haldimand*, 1 *Term Rep.* 180. S. P. *Unwin* v. *Waiſeley*, 1 *Term Rep.* 674.

6. A broker with a commiſſion *del credere* was allowed to ſet off a loſs upon a policy of inſurance happening before a bankruptcy, to an action by the aſſignees againſt him for ſeveral premiums on policies underwritten by the bankrupt, and for which he had debited the broker; for in theſe commiſſions the broker is liable to the principal in the firſt inſtance. *Grove* v. *Dubois*, 1 *Term Rep.* 112. S. P. *Bize* v. *Dickaſon*, 1 *Term Rep.* 285.

7. Where an agent was employed to buy goods, his acknowledgment of having received them was held evidence of a delivery to the buyer, without the plaintiff's being obliged to call the agent as a witneſs. *Biggs* v. *Lawrence*, 3 *Term Rep.* 454.

8. The holder of a bill of exchange deſired *A.* to get it diſcounted, but poſitively refuſed to indorſe it, and *A.* delivered it to *B.* for the ſame purpoſe, informing him to whom it belonged, and *B.* finding that he could not diſpoſe of it without indorſing it, was prevailed upon to do ſo by *A.*'s telling him that he would indemnify him; but the indorſee took it upon the credit of the names on the bill, without any knowledge of the real owner; although ſuch original holder afterwards promiſed to pay the bill, yet ſuch promiſe was held not to ſupport an action againſt him by the indorſee, it being *nudum pactum*; for as *A.* was a ſpecial agent under a limited authority, he could not bind his principal by any act beyond the ſcope of ſuch limited authority. *Fenn* v. *Harriſon*, 3 *Term Rep.* 757.

9. But it appearing on a new trial that the holder did not refuſe to indorſe the bill, the court thought this variation material, and the plaintiff had judgment. 4 *Term Rep.* 177.

10. The fraud of the agent vitiates a tranſaction for the advantage of the principal although he do not perſonally aſſiſt in it. *Doe* v. *Martin*, 4 *Term Rep.* 68. S. P. 1 *Term Rep.* 12.

For more caſes as to *Agents*, &c. ſee *Aſſurance*, *Poſſeſſion*, *Bill of Lading*, and other proper titles.

15 Vin. 309.

(K) Inter ſe.

WHERE in an action for a libel and ſlanderous words, in which the defendant did not juſtify, but pleaded the general iſſue, it appeared that the publication was only in giving a character of the plaintiff his ſervant, and the court held that he could not

not recover without proving the words to have been *false* and malicious. *Weatherstone* v. *Hawkins*, 1 *Term Rep.* 110.

(O) Actions by the Master on account of the Servant.

15 Vin. 325.

1. AN action will lie for continuing to employ the servant of another after notice, though the person so continuing to employ the servant did not procure him to leave his master or know when he employed him that he was the servant of another. *Blake* v. *Lanyon*, 6 *Term Rep.* 221.

2. Trespass on the case will lie for enticing away a journeyman, who works by the day or piece, before his work is finished. *Hart* v. *Aldridge*, 1 *Cowp.* 54.

In an action for enticing away or retaining or employing a servant, it is advisable to give notice to the intended defendant, that the party is servant to the plaintiff, and to demand him: and proving such notice, and a subsequent employment during the time for which the plaintiff hired, retained, took, and engaged the servant, will entitle the plaintiff to a verdict. To this proof must be added proof of the contract between the master and the servant, and that the time was not expired.

3. Where a person was so hired to work at a trade for a limited time, *under a penalty* not to discover the secrets of his master's trade, but having quitted his place, the master *sued him and recovered the penalty*: this was held to discharge the second master from an action for hiring him, the penalty being deemed full satisfaction for the loss of service. *Bird* v. *Randall*, 3 *Burr.* 1345. 2 *Bl. Rep.* 387, S. C.

(Q) Actions, by others against the Master or Servant.

15 Vin. 327.

1. TROVER lies against a servant who disposes of goods the property of another to his master's use, whether he has any authority or not from his master for so doing.

2. Where money is paid to the servant and he misapplies it, the party has his remedy against the master or servant at his election. *Cary* v. *Webster*, 1 *Str.* 480. *Attorney-General* v. *Perry*, 1 *Com. Rep.* 486. But it seems otherwise when the action against the servant is founded upon a tort. *Perkins* v. *Hughes*, 1 *Wils.* 328. or wilful misconduct. *Savignac* v. *Roome*, 6 *Term Rep.* 125.

3. Trover lies against the master for goods delivered to the apprentice. *Mead* v. *Hamond*, 1 *Stra.* 504.

4. The master is liable for the fraud of his apprentice. *Grammar* v. *Nixon*, 1 *Stra.* 653.

5. Action lies against a servant upon a bill drawn on him and accepted generally, though the order is to place it to the account of the master. *Thomas* v. *Bishop*, 2 *Stra.* 955.

6. No action lies against a steward, manager, or agent, for damage done by the negligence of those employed by him in the service

ſervice of his principal, but the principal or thoſe actually employed only are liable.

7. Where a ſervant executes a lawful command of his maſter in an unlawful manner, he is anſwerable for the miſdemeanour, and not the maſter. *Naiſh* v. *Eaſt India Company*, 1 *Com. Rep.* 469.

8. A maſter is not liable for medicines for his ſervant, unleſs on his expreſs undertaking. *Newby* v. *Wiltſhire*, 2 *Eſp. Rep.* 739.

9. The proprietors of a mail coach are anſwerable for any injury happening to a paſſenger through the negligence of their driver. *White* v. *Boulton*, *Peake's N. P.* 81.

[G]

Mayhem.

15 Vin. 144.

(A) What ſhall be ſaid a Mayhem.

1. WHERE a gentleman had apprehended a pickpocket, an accomplice followed and gave the gentleman a wound acroſs the noſe with a knife, this was held to be a ſlitting of the noſe, and a maiming within the ſtatute. *Carrol's* caſe, *Leach's C. Caſes*, 83.

22 & 23 Car. 2. c. 1.

2. It has been determined that if a man deliberately watches an opportunity and carries his intention into execution he may be ſaid to lie in wait; but where a perſon went up to a man ſtealing turnips, who immediately cut him in the face, this was thought not to be a *lying in wait* with intent to *maim*. *Tickner's* caſe, *Ibid.* 222. What acts ſhall be ſo conſidered. *Vide Mill's* caſe, *Ib.* 294.

3 A huſband cutting his wife's throat while in bed, and making thereby a wound three inches in length acroſs her neck, is not a *maiming* or *lying in wait* within this ſtatute. *Lee's* caſe, *Ib.* 61.

15 Vin. 145.

(E) Puniſhed. How.

1. A Perſon who maims himſelf that he may have the more colour to beg, may be indicted and fined. And, by the like reaſon, a perſon who diſables himſelf that he may not be impreſſed as a ſoldier. 3 *Burn's Juſt.* 125.

2. If the mayhem comes not within any of the deſcriptions in the act, yet it is indictable at the common law, and puniſhable by fine and impriſonment: or he may bring an action of treſpaſs, which kind of action hath now generally ſucceeded in the place of *appeals* in ſmaller offences not capital. 2 *Hawk.* 157. 160.

Merchants. [A]

(A) What Regard the Law pays to them, and their Wages.

1. THE cuſtom of merchants is controlled by adjudged caſes, therefore a cuſtom contradictory to ſuch caſes cannot be received in evidence. *Edie* v. *The Eaſt India Company*, 1 *Bl. Rep.* 298. S. C. 2 *Burr.* 1216.

2. But where the cuſtom had not been before judicially determined, evidence of the general opinion and underſtanding of perſons concerned in ſuch buſineſs was admitted. *Camden* v. *Cowley*, 1 *Bl. Rep.* 417. S. P. *Rawlinſon* v. *Stone*, 3 *Wilſ.* 1.

3. The law of merchants and the law of the land is the ſame; a witneſs cannot be admitted to prove the law of merchants. We muſt conſider it as a point of law. *Per Lord Mansfield*, 3 *Burr.* 1669.

See *Trade, Bills of Exchange, Inſurance, &c.*

Merger.

(H) Of what Eſtates. Truſt Term in Equity.

15 Vin. 369.

1. ONE deviſed his real eſtate to his ſon and his heirs, chargeable with 300*l.* to be paid to his daughter on a contingency, which happened; afterwards the ſon died, and on his death the eſtate deſcended to the daughter in fee; and then the daughter died (but whether under age or not did not appear,) without having ſhewn any indication of her intention that the charge ſhould not be merged; but the court thought that the charge was merged. *Ambl.* 246. 1754. *Cheſter* v. *Willes.*

2. Where *tenant for life* pays off an incumbrance upon the eſtate, he ſhall be conſidered as a creditor for the money ſo paid, but where tenant in tail pays it off, it is in exoneration of the eſtate of which he may make himſelf abſolute owner. 1 *Bro. Ch. Rep.* 206. 1783. *Jones* v. *Morgan.*

3. A repreſentative muſt take his intereſt as he finds it, and has no equity to vary it, therefore where a lunatick dies entitled

to an eſtate, and alſo to a charge upon it, the heir takes it diſcharged; a truſt term to ſecure the charge makes no difference; for it remains inert, unleſs required to be executed for proper purpoſes; the truſtees have no diſcretion. And *per* Lord *Loughborough*, Chancellor, at law and in equity where there is a confuſion of rights there is an immediate merger: that is prevented in equity by the intention, either expreſs or implied, as in the caſe of an infant entitled to an eſtate and alſo to a charge upon it, the rights remain diſtinct, becauſe more beneficial. 2 *Veſ. jun.* 261. 1793. *Lord Compton* v. *Oxendon*, 4 *Bro.* 397. S. C.

Meſne Profits.

(B) From what Time.

15 Vin. 393.

1. "ON the marriage of Sir *James Aſh* a ſettlement was made "of two ſhares in the *New River*, and the ſame were "limited to Sir *James* for life, remainder to his wife for life, "and after their deceaſe one ſhare was limited to ſuch of the "younger children of Sir *James Aſh* as were not his heirs at law, "or for want of ſuch iſſue, to the ſiſters of Sir *James* and their "children, as Sir *James* ſhould limit and appoint; but in caſe of "no iſſue of Sir *James Aſh*, or if he ſhould make no appoint-"ment, the ſame was limited to the ſiſters, and the children of "*Catharine*, one of the ſiſters (under whom the plaintiff claims,) "in ſuch manner as they were entitled to one whole ſhare on "the death of Sir *James*." The ſettlement being in the cuſtody of the defendants, they claimed a right to ſuch ſhare, in right of the wife, as the heir of her father, as if no ſettlement had been made. They alſo levied a fine of the two ſhares in the three counties through which the water ran, and received the profits from the death of Sir *James Aſh* in 1733 till the filing of the bill in 1741, when the plaintiffs diſcovering the ſettlement, brought this bill for diſcovery and to be relieved. The fines were levied in *Hil.* term 1733, but no claim was ſet up or entry proved, only that a demand of the profits was made in the office in the name of the defendants on the 14th of *Feb.*, and the firſt payment was made of the *Chriſtmas* dividend before due on the 23d of *Feb.*, which was after the *fine* levied, and no other *ſeiſin* appeared. Sir *James Aſh* died in *November*, the firſt half year became due at *Chriſtmas*, but not received till after the fine was levied. The court were of opinion that the plaintiffs were proper in coming into equity for a diſcovery of the deed under which the title ariſes, to have it produced at trials at law, and to have atteſted

copies,

copies, and alſo to have an account of rents and profits. 3 *Atk.* 336. 1745. *Lord Townſend* v. *Aſh.*

In this caſe the court ſaid, that though it was matter of law, yet the court would determine upon it notwithſtanding, for that it was not neceſſary that every legal queſtion ſhould be ſent to law. Ibid. Sed vide Norton v. Fletcher, 1 Atk. 525. *where the court ſaid that the rule in equity was the ſame as at law, that treſpaſs would not lie for meſne profits till poſſeſſion was recovered, and that a bill could not be brought for an account thereof till then.*

2. Account of profits of coal mines *not* decreed without ſhewing poſſeſſion; the bill was retained with liberty to bring an ejectment. 1 *Veſ.* 232. 1749. *Sayer* v. *Pierce.*

3. Bill filed by a widow againſt the heir of her huſband for dower: the bill was ordered to be retained for a year, to try her right, and writ of dower brought; before iſſue joined the heir died; then the widow's right was eſtabliſhed at law againſt his deviſee: the widow dying, her repreſentatives filed a bill of revivor and ſupplement againſt the executor and deviſee of the heir for the third part of the *meſne* profits, to the death of the widow; which was decreed, and the decree affirmed on a rehearing. 2 *Bro. Ch. Rep.* 620. 1789. *Curtis* v. *Curtis.*

4. Though dowreſs die before her right be eſtabliſhed equity will decree an account of rents and profits of the eſtate of which ſhe is dowable in favour of her repreſentative. 1 *Fonb. Treat. in Eq.* 158. *Wakefield* v. *Child.* 1791.

5. In a doubtful caſe the account of rents and profits was confined to the time of filing the bill. 4 *Bro. Ch. Rep.* 521. 1794. *Forder* v. *Wade.*

6. Account of rents and profits confined to ſix years before the filing of the bill, by analogy to the action for meſne profits. 3 *Veſ. jun.* 744. 1801. *Meade* v. *Meade.*

7. Lord *Hardwicke* held in the caſe of *Dormer* v. *Forteſcue*, it was clear both in law and equity, and from natural juſtice, that the plaintiff, from the death of his father, the time when his title accrued, is entitled to the rents and profits. 3 *Atk.* 124.

8. Where there is a truſt and mere equitable title, the plaintiff ſhall have an account of the rents and profits from the time the title accrued, unleſs there are ſpecial circumſtances to reſtrain it to the bringing of the bill. *Ibid.* The court will reſtrain it to the filing the bill where there has been any default in the plaintiff in not aſſerting his title ſooner. *Ibid.*

(C) Action for them. Who ſhall have Action, and at what Time: after the Eſtate determined. 15 Vin. 304.

1. ACTION for the *meſne profits* is uſually brought by the leſſor of the plaintiff in his own name; and in that caſe, on proving a good title in himſelf, and an actual ouſter and perception of the profits by the defendant antecedent to the demiſe and ouſter in ejectment, he will recover damages for thoſe profits. They are ſeldom however an object of litigation, as the demiſe

and ouſter in ejectment are generally laid ſoon after the time when the leſſor's title accrued. *Runnington on Ejectments*, p. 428.

2. Action for meſne profits (including the coſts of the ejectment,) brought in the name of the leſſee againſt the tenant in poſſeſſion, *after judgment by default*, held to be maintainable. *Aiſlin v. Parkin*, 2 *Bur.* 665.

3. The jury are not in all caſes bound by the amount of the rent, but may give *extra* damages. 3 *Wiſ.* 121.

4. The rule in equity is the ſame as at law, as treſpaſs will not lie for *meſne* profits till poſſeſſion is recovered, ſo neither can a bill be brought for an account thereof till then. 1 *Atk.* 525.

5. It was obſerved *per Cur.* in the caſe of *Treherne v. Greſſingham*, that an action for *meſne* profits tends to create double expence. Why ſhould not the plaintiff be ready at the trial of the ejectment to prove his damages, which may be recovered in that action, without bringing a ſecond for *meſne* profits? The true rule, as to the time from which meſne profits are to be recovered, ſeems to be where judgment is againſt the caſual ejector, from the time of the delivery of the declaration to the tenants in poſſeſſion, or from the time of an actual demand of poſſeſſion proved, where judgment is againſt the tenants in poſſeſſion (or the landlord defending in their ſtead,) from the ouſter admitted by the common conſent rule; but in neither caſe from the demiſe, which may be laid back at the plaintiff's pleaſure. *Barnes*, 87.

6. In the caſe of *Stanynought v. Couſins* it was held, that the plaintiff will be entitled to recover the meſne profits only from the time he can prove himſelf to have been in actual poſſeſſion: and therefore if a man makes his will and dies, the deviſee will not be entitled to the profits till he has made an actual entry. 2 *Barnes*, 367.

7. If, however, a ſubſequent entry has a relation back to the time the plaintiff's title accrued, yet the defendant may plead the ſtatute of limitation, and ſo protect himſelf from all but the laſt ſix years. *Buller's Ni. Pri.* 88.

15 Vin. 197. (K) Pleadings; and what Evidence muſt be given in Actions for them.

1. IT is now ſettled upon principles, that after a recovery in ejectment, the tenant is eſtopped from controverting the plaintiff's title in a ſubſequent action for the *meſne profits*, provided the plaintiff only proceeds for the *meſne profits* from the time of the ouſter complained of in ejectment: but if he proceed for *antecedent profits* he muſt prove his title to the premiſes from whence they aroſe, to ſhew his right to receive them. *Runnington on Ejectments*, p. 440.

2. *Lord Manſfield*, in delivering the opinion of the court in the caſe of *Aiſlin* v. *Parkin*, ſaid, "An action for the *meſne profits* is "conſequential to the recovery in ejectment. It may be brought "by

" by the leſſor of the plaintiff in his own name, or in the name " of the nominal leſſee, and in either ſhape it is equally his ac- " tion. The tenant is concluded by the judgment, and cannot " controvert the title. Conſequently he cannot controvert the " plaintiff's poſſeſſion, becauſe his poſſeſſion is a part of his title: " for the plaintiff, to entitle himſelf to recover in ejectment, " muſt ſhew a poſſeſſory right not barred by the ſtatute of limi- " tations. This judgment, like all others, only concludes the " parties as to the ſubject-matter of it; therefore beyond the " time laid in the demiſe it proves nothing at all; becauſe beyond " that time the plaintiff has alleged no title, nor could be put to " prove any. As to the length of time the tenant has occupied " the judgment proves nothing; nor as to the value; therefore " it muſt be proved how long the defendant enjoyed the premiſes, " and what the value was." This unanimous reſolution of all the judges, upon ſhort plain principles, will not only be a certain and uniform rule upon actions for *meſne profits*, but may tend to put the fictitious remedy by ejectment upon a true and liberal foundation, to attain ſpeedily and effectually the ends of juſtice according to the real merits of the caſe. 2 *Burr.* 667.

3. Hence it ſhould ſeem that in order to prove the plaintiff's title in an action for the *meſne profits* it is only neceſſary to produce the judgment in ejectment; and ſo is the practice where the judgment is *after verdict*; but where the judgment is *by default* the practice is different; then it is uſual not only to produce the judgment, but alſo to prove a writ of poſſeſſion executed. This latter proof does not ſeem to be neceſſary; for if the tenant be concluded by the judgment in ejectment from controverting the plaintiff's title, he is conſequently concluded from controverting his poſſeſſion, which is part of his title. *Bull. Ni. Pri.* 87. *Runn. on Eject.* 442.

4. As to the value of the *meſne profits* the judgment in ejectment does not prove any thing; the value therefore muſt neceſſarily be proved; but in eſtimating it the jury are not confined to the mere rent of the premiſes, but may give whatever damages they think proper. *Goodtitle* v. *Tombs*, 3 *Wilſ.* 118.

5. Bankruptcy is no plea in bar in an action of treſpaſs for the *meſne profits*. *Goodtitle* v. *North*, 2 *Dougl.* 584.

6. Where after a recovery in ejectment, and before an action for the *meſne profits*, the defendant became a bankrupt, and the jury did not include the coſts of the ejectment in the verdict in executing a writ of inquiry on the action for *meſne profits*, the court refuſed to ſet aſide the inquiſition, becauſe the plaintiff might have proved the coſts as a debt, under the defendant's commiſſion of bankrupt. *Gulliver* v. *Drinkwater*, 2 *Term Rep.* 261.

Mill.

15 Vin. 398. (A) *Cuſtoms to grind* at Mills. *Extend to whom*, and what.

A Cuſtom, "That all the inhabitants of a manor ſhall grind all their corn, grain, and malt, which by them or any of them ſhall be uſed or ſpent, ground within the manor at a certain mill," is good. *Cort* v. *Birkbeck*, *Dougl.* 208.

[G] # Miſcaſting.

15 Vin. 403. (A) Miſcaſting by the Plaintiff. When it ſhall prevent Judgment.

1. IF the jury (by allowing intereſt on a judgment) give greater damages than laid; on error brought, the plaintiff ſhall not have liberty, in another term, to remit the ſurplus, to enter judgment for the damages laid only. *Wray* v. *Liſter*, 2 *Stra.* 1110.

2. Where a verdict is given for a greater ſum than the amount of the damages laid in the declaration, and for that cauſe a writ of error is brought, the court will permit the plaintiff to enter a *remittitur* of the exceſs above the ſum laid, on payment of the coſts of the writ of error. *Pickwwood* v. *Wright*, 1 *H. Bl.* 643.

[G] # Miſnomer.

15 Vin. 406. (C. 3) Pleadings. By whom.

1. IF the defendant omit to plead a *miſnomer*, he may be taken in execution by the wrong name. *Crawford* v. *Satchwell*, 2 *Stra.* 1218.

2. If

2. If defendant, ſerved by a wrong name, appears by his true name, and plaintiff declares againſt him by that name, the court will not on motion ſtay proceedings for irregularity, but leave defendant to plead variance. *Hole* v. *Finch*. *Jackſon* v. *Doleman*, 2 *Wilſ.* 393. *Secus*, if plaintiff file common bail for him according to the ſtatute by his right name. *Doo* v. *Butcher*, 3 *Term Rep.* 611.

3. If the *latitat* be ſued out againſt the defendant by one Chriſtian name, and the *alias* by another, and the plaintiff afterwards proceed, the court will ſet aſide the proceedings for irregularity. *Corbett* v. *Bates*, 3 *Term Rep.* 660.

4. Defendant pleaded a *miſnomer* in abatement which was after an *imparlance* thus: "At which day came *Ham John Crapper* (the defendant's true name) who is ſued by the name of *John Capper*, *&c.*" to which the plaintiff demurred; and objected that this plea being in *abatement* ought to have been pleaded of the ſame term with the declaration, or after a *ſpecial imparlance*, and that this is after a *general imparlance*. But *per curiam*—this *imparlance* by the true name is *ſpecial* for this purpoſe; but if he had ſaid *venit predict. John Capper* it had been bad, for that would have confeſſed that *John Capper* was the true name. *Brewſter* v. *Capper*, 1 *Wilſ.* 261.

5. Where defendant had been ſued as the Right Honourable *Hamilton Fleming*, Earl of *Wigtoun*, having privilege of peerage, and had judgment againſt him, and in debt on that judgment he was called *Hamilton Fleming* Eſquire, commonly called Earl of *Wigtoun*; on *nul tiel record* pleaded, held to be a failure of record. *Blackmore* v. *Fleming*, 7 *Term Rep.* 447.

6. A miſnomer may be pleaded in abatement, where the plaintiff miſnames himſelf. 1 *Boſ. & Pull.* 44.

7. If defendant pleads *miſnomer*, but his plea and affidavit are entitled by the wrong name, his plea ſhall be ſet aſide. *Barnes*, 348.

8. If the plea begins "*A.* the ſaid *A. B.* who is ſued by the name of *C. D.*" it is bad, but the court gave leave to amend on payment of coſts. *Jackſon* v. *Ford*, 3 *Wilſ.* 413.

9. Any variation in the name of a corporation is fatal. *Turvil* v. *Ainſworth*, 2 *Stra.* 787.

10. A variance in the name of the perſon from whoſe dwelling-houſe goods are ſtolen to 40*s.* value, as "*Sarah Luns*" inſtead of "*Sarah London*" is fatal to the *capital part* of the charge. *Woodward*'s caſe, *Leach's Ch. Ca.* 287, *notes*.

(C. 6) Abatement of *Writ* by what *Miſnomer*. Names of Baptiſm. 15 Vin. 413.

1. WHERE a defendant is baptiſed by the name of *Richard James*, and is declared againſt as *James Richard*, he may plead the miſnomer in abatement. *Jones* v. *Macquillin*, 5 *Term Rep.* 195.

2. A declaration against *John A.* otherwise *John James A.* is bad, for a man cannot have two Christian names. *Evens* v. *King*, *Willes Rep.* 554.

3. If defendant is sued by a wrong Christian and surname, he may plead it in one plea, and it is not double. *Read* v. *Matteux*, T. 9 G. 2. *B. R. H.* 286. 4 *Com. Dig.* tit. *Abatement*.

4. Defendant need not aver that he was baptised by his Christian name, only that it is his name, and by that name he was always called, &c. *Ibid.*

5. If bond be given to *Elizabeth*, and action brought in the name of *Elizabeth*, defendant shall not plead that the plaintiff's name is *Isabel*. *Monkhouse* v. *Hutchinson*, *Bunb.* 101.

6. The plaintiff brought trespass and false imprisonment by the Christian name of *Archibald*. The defendant justified under a *capias ad satis.* upon a judgment against *Arthur*: and averred that the plaintiff in this action was the same person who was sued by the name of *Arthur*. And on demurrer, the court held it a good plea, the defendant having missed his time for taking advantage of the *misnomer*, which should have been by pleading it in the first action. In the case of a bond given in a wrong name, he must be sued by that wrong name, and the execution must pursue it. The defendant had judgment. *Crawford* v. *Satchwell*, 2 *Stra.* 1218.

7. Earl of *Litchfield* is a sufficient description, though the Christian name be mistaken, for there can be but one Earl of *Litchfield*. *Ingoldsby* v. *Martin*, 1 *Stra.* 316.

8. Where an indictment for larceny laid the goods stolen to be the property of "*Victoire* Baroness *Turkheim*," and it appeared that she always went by that name, though her real name was *Selina Victoire*, and Baroness *Turkheim* her title only, it was held good. *E. Sulf's* case, 2 *Leach's Ch. Ca.* 1005.

9. Where the name of the plaintiff is mistaken in the process, and in all the proceedings, the court will give leave to amend while all is on paper. *Gardner* v. *Walker*, 3 *Anstruther's Reports*, 935.

15 Vin. 424. (C. 7) Pleadings. Known by the one Name and the other.

TO a plea of *misnomer* to an indictment, which may be pleaded *ore tenus*, the clerk of the arraigns may reply, that the prisoner is known, as well by the one name as the other. *Dean's* case, 1 *Cr. Cases*, 535.

15 Vin. 416. (C. 9) Pleadings. Of the Place where.

1. THE plaintiffs were incorporated by the name of "The mayor and burgesses of the borough of *Stafford*, in the county of *Stafford*," and sued by the name of "the *Mayor* and *Burgesses*

Burgeſſes of the bordugh of *Stafford*." This miſnomer is pleadable in abatement, and cannot be taken advantage of in any other way. *Stafford* v. *Bolton*, 1 *Boſ. & Pull. Rep.* 40.

2. In the margin of the declaration ſtood the word *Middleſex*, and defendant's addition was *late of Weſtminſter*, without ſaying in the county aforeſaid. Defendant pleaded in abatement, that it did not appear by the declaration at what place he was commorant. Plaintiff moved to ſet aſide the plea. The court ſaid it might be demurred to, but they would not ſet it aſide on motion. *Barnes*, 338.

3. Plaintiff may name the defendant of the place where he *lately* dwelt. *Cortiſſos* v. *Munez*, 2 *Stra.* 923.

Money. [G]

(A) In what Caſes it may be followed. 15 Vin. 420.

1. MONEY covenanted to be laid out in land ſhall deſcend *as land*; but he that would be entitled to the fee of the land when purchaſed may diſpoſe of it by will, though not atteſted by three witneſſes; alſo a parol direction for the payment of it ſeems to be good. So if money is ordered or deviſed to be laid out in land and ſettled to the uſe of *A.* in tail, remainder to himſelf in fee, equity will order the money to *A. ſecus* if the remainder thereof be limited to a third perſon; alſo though by a voluntary contract money is agreed to be laid out in land, the court will execute ſuch agreement in favour of the heir. *Edwards* v. *Counteſs of Warwick*, 2 *P. Wms.* 171.

2. One articles to buy land, and dies; his executors ſhall pay the money, but the heir ſhall have the lands. 2 *P. Wms.* 632.

(C) Pleadings and Judgment. 15 Vin. 421.

1. DOLLARS, or *Portugal* money, not current by proclamation, are not *goods* within the meaning of the 24 *Geo.* 2. *c.* 45. *Leigh's* caſe, 1 *Leach's Cr. Ca.* 62.

2. *Money* is not within the meaning of the ſtatutes 3 *W. & M. c.* 9. and 5 *Ann. c.* 31. againſt the buyers or receivers of ſtolen *goods* or *chattels*. *Guy's* caſe. *Ibid.* 276.

3. Where the plaintiff declared in *indebitatus aſſumpſit* for money *lent* by him *to one James Dalrymple*, at the ſpecial inſtance and requeſt of the defendant, the judgment was arreſted, for the word *lent* is a technical term, and imports a loan to *J. Dalrymple*; if ſo,

he

he was the debtor, and therefore *the defendant could not alſo be indebted*; for there cannot be a double debt on a ſingle loan. But it had been otherwiſe, had the party declared for money *delivered* to ſuch a perſon at the requeſt of the defendant, for then the loan had been to the defendant himſelf. *Marriot* v. *Lyſter*, 2 *Wilſ.* 141.

4. But where the plaintiff declared for money *lent to the defendant's wife* at his requeſt, and it was attempted to arreſt the judgment on the authority of the above caſe, the court held that a loan to the wife, at the huſhand's requeſt, was a loan to the huſband himſelf, for the huſband and wife are but one perſon. *Stephenſon* v. *Hardy*, 3 *Wilſ.* 388.

5. A bond conditioned for payment of money on 25th *December*; a ſubſequent deed between the ſame parties, by which the obligee covenanted, that if the obligor ſhould pay on the 25th *December* 5*s.* in the pound, *&c.*, ſuch payment ſhould be accepted in full diſcharge and ſatisfaction of all ſums due, *&c.* and might be pleaded and given in evidence, *&c.* the obligor (to an action on the bond) pleaded a tender and refuſal of the 5*s.* in the pound on the 25th of *December*, and holden good. *Trevett* v. *Angus*, *Willes Rep.* 107.

6. On debt on recognizance of bail, if the record is conditional, and the declaration not, the plaintiff cannot have judgment. *Barnes*, 60.

7. On a certificate of the commiſſioners of army debts for 105*l.* 18*s.* 7½*d.*; the demand (which it was neceſſary by the ſtatute to make) had been made for 105*l.* 18*s.* 6¾*d.*, and plaintiff was nonſuited. *Bunb.* 166.

Mortgage.

(A) What it is.

15 Vin. 436.

1. MONEY due upon a mortgage is a debt of the mortgagor, to the payment whereof his perſonal eſtate is primarily liable (the land being conſidered only as a pledge) as between his heir or deviſee, and executor, unleſs ſome expreſs, or neceſſarily implied declaration of his, exempts his perſonal eſtate, and throws the charge on his real. 5 *Bro. Par. Ca.* 299. 1772. *Earl of Belvidere, Appellant, and Wm. Rochfort, Reſpondent.*

2. *Per* Lord *Hardwicke*, Chancellor. It is determined on the ſtatute of frauds, that if a mortgage is intended by an abſolute conveyance in one deed, and a defeazance making it redeemable in another: the firſt is executed, and the party goes away with the defeazance; this is not within the ſtatute of frauds. 2 *Veſ.* 225. 1750. *Dixon* v. *Parker.*

3. A mortgage

3. A mortgage may be made of a ſhip at ſea, and if the mortgagee takes all methods in his power to get the poſſeſſion, ſuch as a bill of ſale, &c. it will be out of the ſtat. *James* 1ſt, as was held in *Brown* v. *Heathcote*, which was taken notice of by the judges in *Ryal* v. *Rowles*, otherwiſe no ſecurity could be made of a ſhip at ſea. But the ſuffering the ſhip to come back, and go on another voyage, makes it a very different caſe. *Ver* Lord *Hardwicke*. 2 *Veſ.* 272. 1751. *Ex parte Matthews*. See *Brown* v. *Heathcote*, 1 *Atk.* 160 1746. Anſtr. 209.

4. A depoſit of a deed entitles the holder to have a mortgage. 1 *Bro. Ch. Rep.* 270. 1783. *Ruſſel* v. *Ruſſel*.

(B) What is a Mortgage and what a Purchaſe. 15 Vin. 437.

1. WHERE by the expreſs terms of a mortgage it is agreed, that if the money be not paid within a certain time the eſtate ſhall not be redeemable; this is conſidered in the nature of an original purchaſe, and no redemption ought to be allowed, eſpecially after a lapſe of many years. 4 *Bro. Par. Caſ.* 142. *March* 1733. *Taſburgh App. and Sir Robert Echlin and others Reſp.*

2. *A.* conveys land to *B.* and his heirs by leaſe and releaſe, and by a defeazance bearing date with the releaſe agrees that if he pays 1000*l.* borrowed of *B.* within a year, that *B.* ſhould reconvey to him; but if he failed to pay the money within the year, then *B.* ſhould mortgage or abſolutely ſell the ſame lands free from redemption. The money not being paid at the time, *B.* agreed to convey the eſtate to *C.*, and in the agreement and conveyances an exception was made, and the defeazance was mentioned; and a queſtion ariſing, whether *C.* had an abſolute eſtate, the court determined that he had purchaſed an eſtate ſubject to a redemption by *A.* *Comyn's Rep.* 603. 11 *G.* 2. *Croft* v. *Powell*.

3. Two contract to buy an eſtate in mortgage, and covenant to indemnify each other againſt his ſhare of the mortgage debt; it does not make the debt his own ſo as to be payable out of his perſonal eſtate in the firſt place. *Ambl.* 171. 1753. *Forreſter* v. *Lord Leigh*.

4. The plaintiff's grandfather in 1689 mortgaged the eſtate in queſtion to the *Whiteheads*; they afterwards mortgaged it to *Cartwright* and *Heywood*, and their heirs for 200*l.*, who, to ſecure the intereſt, leaſed the eſtate to the plaintiff's father in *June* 1689, and to his aſſigns for 5000 years, at 12*l.* a-year rent for the three firſt years, and 10*l.* a-year for the remainder of the term, and if at three years end the 200*l.* was paid, and intereſt, then the premiſes were to be re conveyed; receipts were given ſometimes for intereſt, and ſometimes for a rent charge; the laſt in 1730. The 200*l.* lent was charity money, directed to be laid out in the purchaſe of lands in fee, the rents to be applied for the clothing 24 needy houſekeepers: in 1738 the plaintiff gave notice he would

pay

pay in the money, but the defendant refuſed to take it, and inſiſted it was an abſolute purchaſe, and ſo it was decreed by the *Maſter of the Rolls*; and the decree was affirmed. 2 *Atk.* 494. 1742. *Mellor* v. *Lees.*

25 Vin. 440.

(C) Diſputes between the Mortgagor and Mortgagee.

1. WHERE a mortgagor brings a bill to redeem, and after a decree the account is taken by the Maſter, but before any thing further is done the plaintiff dies; his infant ſon and heir is bound by the account. 4 *Bro. Par. Ca.* 447. 1742. *Badham* v. *Odell.*

2. A mortgagee ſhall not be allowed to preſent to a living which becomes vacant, becauſe nothing can be taken for it, but ſhall be looked upon as a truſtee for the mortgagor or his grantee, and ſhall preſent ſuch perſon as they ſhall name. *Comyn's Rep.* 343. 7 G. 1. *Galley* v. *Selby.* See *Bunb.* 130. S. P.

3. Where it appeared that the ſolicitor of the mortgagee had a ſettlement belonging to the mortgagor in his poſſeſſion, and was a truſtee for both, the court would not order him to deliver it up to mortgagor. *Bunb.* 298. 1731. *Siddon* v. *Charnells and others.*

4. A mortgage of a brewhouſe with the *appurtenances*, will not convey the utenſils, but the things only belonging to the outhouſes. 1 *Atk.* 477. 1750. *Ex parte Quincy.*

5. Equity only removes fraudulent conveyances out of the way, but will not decree profits back againſt the original debtor and owner of the eſtate received *pendente lite* in favour of judgment creditors from filing of the bill. 2 *Atk.* 107. 1740. *Higgins* v. *The York Buildings Company.*

6. A mortgagor in poſſeſſion is not liable for the rents and profits to the mortgagee, for he ought to take the legal remedy to get into poſſeſſion. *Ibid.* See alſo 3 *Atk.* 244. 1745. *Mead* v. *Lord Orrery.*

7. A mortgagee may refuſe to part with the deeds till the money is paid, but ought not to deny an inſpection of them in his hands. 2 *Atk.* 330. 1742. *Thornhill* v. *Evans.*

8. A mortgagee is not precluded from bringing an ejectment at law at the ſame time he has a bill of foreclоſure depending in equity. 2 *Atk.* 343. 1742. *Booth* v. *Booth.*

9. A mortgagee in poſſeſſion is not obliged to lay out money any farther than to keep the eſtate in neceſſary repair. 3 *Atk.* 518. 1747. *Godfrey* v. *Watſon.*

10. After foreclоſure and ſale, the amount being inſufficient, the mortgagee may bring an action on his bond for the reſidue of his debt. 2 *Bro. Ch. Ca.* 125. *Mich.* 1786. *Tooke* v. *Huntley.*

11. On a bill of foreclоſure it was referred to the deputy remembrancer to take an account of what the mortgagee had received for the rents, *&c.*, or might have received, without wilful neglect. It appeared that the premiſes (malthouſes, *&c.*,) had been

been allowed to fall so much out of repair, that the rent fell from 22*l.* to 18*l.* Plaintiff had done some repairs and had held 40 years. The court were of opinion, that as the *only* proof of the repairs being insufficient is the diminution in value, we must confirm the report; for it cannot be supposed that after 40 years possession, the mortgagee is bound to leave the premises in as good condition as he found them. 1 *Anstr.* 96. 33 *G.* 3. *Russel* v. *Smithies.*

12. The plaintiff, a mortgagee, had got possession of the mortgaged estate by ejectment, sued at law upon the covenant for non-payment, and brought this bill to foreclose, which the court held regular, and refused to stop the proceedings at law, unless the defendant would bring the money into court. 2 *Anstr.* 497. 35 *G.* 3. *Rees* v. *Parkinson.*

13. On a bill to redeem, the mortgagee cannot object that the bill does not state a valid legal conveyance to him. 3 *Anstr.* 715. *East.* 36 *Geo.* 3. *Roberts* v. *Clayton.*

(D) Disputes between Mortgagor, Mortgagee, and Mortgagee. 15 Vin. 442.

1. A Leasehold estate is affected by an *elegit* or *fieri facias* from the time it is lodged in the sheriff's hands, and if the debtor, subsequent to this, makes an assignment of it, the judgment creditor may proceed at law to sell the term, and the vendee will be entitled to the possession notwithstanding such assignment. 3 *Atk.* 739. 1757. *Burdon* v. *Kennedy.*

2. Mortgage of a ship in the port of *Dublin*, and delivery of muniments. The mortgagee insured her there, and made a second mortgage: the second mortgagee took possession as soon as he was informed that she was in an *English* port. This is sufficient to take it out of the stat. 21 *Jac.* 1. *c.* 19. 3 *Bro. Ch. Rep.* 362. *Ex parte Batson.*

(E. 2) Disputes between Mortgagor and Assignee of Mortgagee, the *Mortgagor not joining.* 15 Vin. 443.

1. ASSIGNMENT of a mortgage without the privity of the mortgagor, the assignee takes subject to the account between the mortgagor and mortgagee. 4 *Ves. jun.* 118. 1798. *Mathews* v. *Wallwyn.*

2. As between mortgagee and persons claiming under him without the privity of the mortgagor, they cannot add to what is due, settle the account, or turn interest into principal. *Ibid.* 128.

3. By indenture dated the 10th of *April* 1792, *Benjamin Sorrell* mortgaged certain leasehold premises in the county of *Middlesex* for the remainder of his term of 60 years, to secure the sum of 300*l.* with interest to *Thomas Clifton*, subject to redemption upon payment

payment of the principal and intereſt upon the 29th day of *Sept.* following; and the ſaid indenture contained a covenant by the mortgagor for payment of the mortgage money and intereſt, and he gave a bond of the ſame date for the ſame. *Benjamin Cliſton*, by indenture of the 16th *Jan.* 1794, in conſideration of 600*l.* advanced him by *Ann Williams*, aſſigned the mortgage to her, her executors, adminiſtrators, and aſſigns, ſubject to redemption on payment of 600*l.* and intereſt on or before the 16th *Jan.* 1795: and as a farther ſecurity *Cliſton* mortgaged other premiſes, and gave a bond of the ſame date in the penalty of 1200*l.* The aſſignment of the mortgage was duly regiſtered. *Sorrell*, upon the 13th of *Jan.* 1796 paid to *Cliſton* 100*l.* on account of the principal, and 14*l.* 10*s.* for intereſt due on the mortgage: the receipt for which ſums expreſſed the former to be "in part of 300*l.* ſecured by mortgage," and the latter to be "for intereſt due at *Lady-day* next." Upon the 22d of *May* 1796, *Sorrell* paid to *Cliſton* the farther ſum of 100*l.* on account of the ſaid principal money, the receipt for which expreſſed that payment to be "in part of 200*l.* due upon the mortgage." Upon the 18th of *May* 1797, *Cliſton* became bankrupt; in *July* the aſſignee of the mortgage filed a bill for the foreclоſure, charging, that the regiſtry of the aſſignment was notice to the mortgagor. Upon the 14th *Sept.* 1797, the money remaining due by the defendant for principal and intereſt, the payments made to *Cliſton* being deducted, and the coſts up to that time were tendered on the part of the defendant to the plaintiff, and refuſed. The mortgagor by his anſwer denied any notice of the aſſignment until the 22d of *April* 1797, when he was applied to by the ſolicitor for the plaintiff for the whole 300*l.* and intereſt; he denied colluſion, and prayed his coſts from the time of the tender. And the court decreed, that the mortgagor, the defendant, ſhould be at liberty to redeem upon payment of what remained due, deducting the payments to *Cliſton*, with coſts to the time of the tender only. 4 *Veſ. jun.* 389. 1799. *Williams* v. *Sorrell.*

15 Vin. 444. ## (F) Diſputes between Mortgagee and Mortgagee.

1. A Third mortgagee having lent his money without knowing that there was a ſecond mortgage upon the ſame eſtate, may pay off the firſt incumbrancer, and taking an aſſignment of his intereſt to himſelf, hold the eſtate againſt the ſecond mortgagee, till he ſhall be paid what is due to him upon both mortgages. 6 *Bro. Par. Ca.* 28. 1764. *Belchier* v. *Meuſorth.*

2. *Spencer* made a mortgage of the lands to the plaintiff, and the plaintiff having a great confidence in the ſaid *Spencer*, and the mortgage being executed in *London*, and *Spencer* pretending his title deeds were in the country, the plaintiff lent his money to *Spencer*, taking *Spencer*'s word, that he would deliver to him the title deeds. *Spencer* borrowed 2000*l.* of Dr. *Egerton* the defendant,

ant, on a mortgage of the ſame lands; at the ſame time producing and delivering to the defendant *Egerton* all his title deeds, which were peruſed by the defendant *Egerton*'s counſel, and thereupon the title approved. Bill by plaintiff the firſt mortgagee to foreclose, and to compel the defendant to diſcover the title deeds relating thereto, and to deliver up the ſaid title deeds to the plaintiff; but the court was of opinion, that the firſt mortgagee having permitted the mortgagor to keep the title deeds, he was acceſſory to drawing in the ſecond, and therefore would not compel the defendant to deliver up the title deeds, unleſs the firſt mortgagee would pay him his mortgage money. 3 *Wms.* 280. 1734. *Head* v. *Egerton.*

See Ryale v. Rowles, 1 Veſ. 360. *See alſo* Stanhope v. Earl Verney, Co. Lit. 293. b. *note, on a declaration of a truſt of a term, where Lord* Northington *decreed in favour of the ſecond incumbrancer, who had poſſeſſion of the deeds, againſt a former aſſignment without delivery of the deeds. See alſo* Goodtitle v. Morgan, 1 Term Rep. 755.

3. A decree had been obtained in 1748 in a cauſe, wherein the now plaintiff and the defendants among other creditors were plaintiffs for the ſale of the eſtate of one *Manaton.* The Maſter was directed to inquire into the priority of the demands. The plaintiff bought in an incumbrance in 1694, and made a claim before the Maſter to have it tacked to his mortgage, and thereby to be paid before the defendants; the Maſter refuſed to make a report as to that; whereupon the plaintiff filed this bill. A demurrer was put in to ſo much and to ſuch parts of the bill as ſought to have a ſatisfaction for the money claimed by the plaintiff to be due under the ſecurities in the bill ſet forth in preference to the defendant's mortgages. And the court was of opinion, that although a *puiſne* incumbrancer may *pendente lite* take in the firſt and gain a preference to a ſecond by tacking the firſt to the third; yet he cannot do ſo after a decree and directions to ſettle the priorities; and allowed the demurrer. 2 *Veſ.* 571. *Aug.* 1754. *Wortley* v. *Birkhead,* 3 *Atk.* 809. S. C.

4. Upon ſettling the priority of creditors after the Maſter's report, defendant the mortgagee inſiſted that he could not be redeemed without being paid his judgment debts, and alſo a bond-debt in preference to the plaintiff's claiming under a deed of truſt by the mortgagor in his lifetime conveying the equity of redemption; and that although a bond cannot be tacked againſt the mortgagor himſelf coming to redeem, it may be againſt the heir of the mortgagor; and the plaintiffs coming after the mortgagor's death, come in place of the heir. The court was of opinion, that as to the judgment debts the defendant ought to have the benefit of them, they being prior to the truſt deed, and as to what was reported due thereon, that he was intitled to a priority to the creditors under the deed of truſt; but that the bond could not be tacked, as the bond is a charge upon aſſets, and the court never does it againſt creditors. 2 *Veſ.* 663. 1755. *Anon.* See alſo 1 *Veſ. jun.* 513. 1792. *Hamerton* v. *Rogers,* S. P.

5. Where

5. Where a ſubſequent purchaſer or mortgagee who *pro tanto* is a purchaſer, has notice of a former purchaſe or incumbrance, he cannot avail himſelf of an old outſtanding term prior to both, in order to get a preference; but if he has no notice of ſuch prior purchaſe or incumbrance, and having the beſt right to call for the legal eſtate, gets an aſſignment of it, equity will not deprive him of the benefit of it; for a purchaſer *bonâ fide*, for a valuable conſideration, and without notice, cannot be hurt in equity, nor have the benefit of the law taken from him: notice makes him come fraudulently. Alſo where a ſecond mortgagee of an eſtate, on which there is an old outſtanding term, has notice of an incumbrance prior to his own, as he has not the legal eſtate in him, nor the beſt right to call for it, the whole title and conſideration being in equity, the general rule muſt take place, *viz. qui prior eſt in tempore, potior eſt in jure*, and the prior incumbrancer may ſatisfy himſelf of any other incumbrances on the eſtate, though unknown to the puiſne mortgagee when he advanced the money. 2 *Veſ.* 685. 1756. *Willoughby* v. *Willoughby*.

6. *John Barnardiſton* being entitled under a ſettlement in 1695 to a remainder in tail expectant on the death of Sir *Samuel Barnardiſton*, and ſubject to a term of 99 years, for raiſing 12,000*l.* by indenture of 7th and 8th *Auguſt* 1732, granted a rent charge of 100*l.* a-year to plaintiff and his heirs. On the 9th of the ſame month he granted a rent-charge of 100*l.* a-year to *Gibbons*, and covenanted, that the eſtate was free from incumbrances, except the rent charge to plaintiff. *John Barnardiſton* afterwards coming into poſſeſſion of the eſtate, and having ſuffered a recovery to himſelf in fee, by indentures of leaſe and releaſe 13th and 14th *March* 1735, in conſideration of *Gibbons* having extinguiſhed the rent charge of 9th *Auguſt* 1732, granted him a new rent charge of 100*l.*, which was afterwards aſſigned to *Northey* in 1748, and has been ſince aſſigned to *Jolliffe*. There was a ſecond rent charge granted to the plaintiff, and two others to *Gibbons* by *John Barnardiſton*, ſubſequent to that in 1735, which was aſſigned to *Northey* and Sir *William Jolliffe*, who got an aſſignment of the term of 99 years by way of mortgage. Plaintiff became owner of the inheritance, and, the eſtate proving deficient to pay all the charges upon it, filed his bill to redeem the eſtate on payment of what was due for principal and intereſt, on the term of 99 years. The defendants ſet up the term as a protection to their ſeveral rent charges. The queſtion was, whether they are affected by notice of plaintiff's rent charge, and therefore to be poſtponed thereto, as to all or any of their rent charges. And the court was of opinion, that as to all the rent charges, except the rent charge of 1735, the defendants were to be preferred to the plaintiff; for as to them, the defendants are not affected with notice of the rent charge of 1732. *Ambl.* 311. 1756. *Mertins* v. *Jolliffe*.

7. Where

7. Where a purchaſer cannot make out his title but through a deed, which leads to a fact, he will be affected with notice of that fact, and where one affected with notice, conveys to another without notice, the aſſignee, *having the legal eſtate*, ſhall not be affected with notice to the aſſignor, and *vice verſa*. *Ibid.*

8. Mortgagee of a *reverſion* not having the title deeds, ſhall not be poſtponed to another mortgagee (whoſe mortgage was made after the mortgagor came into poſſeſſion,) who has the title deeds, there being neither fraud nor groſs negligence. 2 *Bro. Ch. Rep.* 650. 1789. *Tourle* v. *Maude and others.* *In* Penner *v.* Jemmat, 28 *June* 1785, in notis, *Lord Chancellor ſaid, that there muſt be a voluntary leaving of the deeds, to entitle the ſecond mortgagee to have the prior mortgage poſtponed.*

By indenture tripartite 13 Feb. 1758, between Barrows Smith *and* John Applebee, *of the firſt part; plaintiffs, the truſtees, of the ſecond part;* and Edward Maude *and all other the joint and ſeparate creditors of ſaid* Smith and Applebee, *who ſhould ſign and ſeal the preſents, of the third part; reciting, among other things, that ſaid* Smith and Applebee *were indebted jointly to divers perſons on account of their trade, and to divers perſons on their ſeparate accounts, it was witneſſed, that the ſaid* Smith *and* Applebee (*by the direction of* Maude, *&c.*) *did grant, bargain, ſell, and aſſign to plaintiffs, all their joint and ſeparate goods, chattels, &c. (except as therein mentioned,) for the benefit of their creditors, and for ſuch uſes as therein mentioned; and alſo reciting* inter alia, *that the ſaid* John Applebee *was entitled at ſ. his own ſeparate eſtate, to a reverſion in fee or fee tail, expectant on the death of his mother, of divers meſſuages in the county of* Kent. *It was further witneſſed, that the ſaid* John Applebee *did, for himſelf, his* heirs, executors, and adminiſtrators, *covenant with the plaintiffs to convey and aſſure to them and their heirs, all his eſtate and intereſt therein, &c. upon truſt to be ſold, and the money ariſing thereby to be applied upon the ſame truſts and purpoſes as aforeſaid. And the deed contained a general covenant from* Smith *and* Applebee *for further aſſurances.* Maude *afterwards ſued out a commiſſion of bankruptcy againſt* John Applebee, 23d April 1760, *and he and* Facatus Shard *were choſen aſſignees, and an aſſignment and bargain and ſale executed to them. The aſſignees,* 21ſt Dec. 1760, *filed their bill againſt the plaintiffs to ſet aſide the truſt deed. On the* 13th *of* March 1761, *an order was made that the parties ſhould bring actions to try their rights, and the plaintiffs obtained a verdict in an action of trover againſt the aſſignees; and the aſſignees were nonſuited in an action which they brought againſt the plaintiffs.* Mary Applebee, *the mother of* John, *died on the* 4th Feb. 1762. *Plaintiffs, the truſtees, filed their bill againſt the aſſignees to have the eſtate delivered to them: both cauſes came on together,* 12th Nov. 1763, *before Lord* Northington, *when a decree was made confirming the truſt deed, and ordering the aſſignees to join in conveying all their eſtate and intereſt in the ſaid meſſuages to the plaintiffs the truſtees, or as they ſhould appoint; his lordſhip being of opinion that as the eſtate was bound by a ſpecific covenant for further aſſurance from the bankrupt, they are become entitled to that intereſt, which, on the bankruptcy and the operation of law thereon, is now veſted in the ſaid defendants, the aſſignees; and the bill filed by the aſſignees was diſmiſſed with coſts.* Edwards v. Applebee, 1765. 2 Bro. Ch. Rep. 652. in notis.

9. The title deeds of an eſtate were depoſited with the plaintiff as a ſecurity for his demand. The defendant, 14 years afterwards, upon the eve of a bankruptcy of the mortgagor, took a mortgage, ante-dated; he had notice of the depoſit, but avoided inquiring into the purpoſe for which it was made. The depoſit prevailed. 2 *Anſtr.* 427. *Hil.* 34 *G.* 3. *Birch* v. *Ellames and others*, 98. See *Earl of Deloraine* v. *Browne*, 3 *Bro. Ch. Ca.* 633. *Smith* v. *Clay*, *in notis.*

10. Title deeds were depoſited as a ſecurity for money; the defendant, a creditor of the mortgagor, fearing his immediate inſolvency, took a conveyance of the ſame premiſes *without notice* of the depoſit. The conveyance was held good. 2 *Anſtr.* 433. *Hil.* 34 *Geo.* 3. *Plumb* v. *Fluitt.*

15 Vin. 448.

(H) Diſputes between Mortgagee and Creditors.

1. THERE being accounts ſubſiſting between *A.* and *B.* a banker, *A.* gives a caſh note to *C.* for 5000*l.* and *A.* mortgages his eſtate to *B.* as a collateral ſecurity for the money. *C.* keeps the note by him, and after the mortgage was forfeited, *B.* becomes bankrupt. *A.* brings his bill againſt the mortgagee, becauſe *C.* neglected to turn the note into money: held, that *A.*'s eſtate was liable to pay the principal and intereſt due on the mortgage. 4 *Bro. P. C.* 553. 1746. *Lake* v. *Maſon.*

2. One ſeiſed in fee, ſubject to ſeveral equitable incumbrances, conveys the legal eſtate by way of mortgage, and covenants againſt incumbrances, except ſome of the equitable incumbrances, which were later in date to the others: held, the mortgagee having no notice of the other incumbrances was a truſtee for the excepted creditors only, who had by that means got preference of the others. *Ambl.* 153. 1752. *Ingram* v. *Pelham.*

3. One having contracted for a copyhold eſtate, deviſed it and a freehold eſtate to his ſon, ſubject to an annuity to his wife: the ſon confirms the annuity, and the wife releaſes the freehold and copyhold; the ſon is admitted to the copyhold as heir at law, and ſurrenders it to the mortgagee: held, the mortgagee is to be preferred to the annuitant. *Ambl.* 181. 1753. *Wilſon* v. *Stafford.*

4. Rector entitled to an annual ſtipend in lieu of tithes, to be collected by a pound rate, aſſigns it by way of mortgage; afterwards a creditor of the rector gets judgment, and in regular courſe a ſequeſtration of the ſtipend: held, the mortgagee ſhould be preferred to the ſequeſtration creditor. *Ambl.* 485. 1757. *Errington* v. *Dr. Howard.*

21 Vin. 449.

(I) Diſputes between Mortgagee and after Purchaſors.

1. A Mortgagee, till he is fully ſatisfied, is not obliged to quit the poſſeſſion to a purchaſor. 2 *Atk.* 2. 1737. *Davy* v. *Baker.*

2. Owner of eight ſixteenths of a ſhip mortgages, he afterwards ſells to different perſons, one of whom got poſſeſſion of the ſhip and the grand bill of ſale, upon which the purchaſor's name was, but it was not dated; held, the mortgagee ſhould be preferred. *Ambl.* 652. 1767. *Gilleſpy* v. *Couts.*

3. Upon the purchaſe of an equity of redemption, the agreement of the purchaſor with the vendor to pay the mortgage, without any communication with the mortgagee is not ſufficient to make it the perſonal debt of the purchaſor. 5 *Veſ. jun.* 534. 1800. *Butler* v. *Butler.*

(K) Diſputes between Tenant for Life, *and Remainder-man, &c.* of the Lands mortgaged. 15 Vin. 450.

1. A Mortgagee (not in poſſeſſion) joins with the tenant for life in a ſale of the next preſentation to a church; this ſale is void, as againſt the perſon in remainder; and the purchaſor, as a truſtee for him, ſhall, on an avoidance, preſent ſuch perſon to the church as the remainder-man ſhall appoint. 1 *Bro. P. C.* 81. 1704. *Dymoke and others* v. *Sir John Hobart, Bart.*

2. Tenant for life makes a mortgage in fee, pretending to be ſeiſed in fee; the mortgagee, not having notice of the ſettlement, is not bound. 3 *Bro. P. C.* 71. 1725. *Putland* v. *Sir Walter Burrows.*

3. The courſe of the court with regard to tenant for life is, that he ſhall keep down the intereſt by the rents and profits; but portions or principal money, or any other incumbrance ſhall be borne by the whole eſtate. *Lady Saville* v. *Sir Geo. Saville.* 2 *Atk.* 463. 1720.

4. Sir *Geo. Saville*, tenant for life, had a power to cut down what timber he pleaſed as part of the profits of his eſtate, and as thoſe in remainder could not have ſtopped him, or have prayed to have their portions raiſed now out of it, if it were ſtanding, they cannot now have any benefit of it, now it is actually cut down and ſold. *Ibid.* 464.

5. Father tenant for life, and ſon join in raiſing money received by the father; he muſt exonerate the ſon's eſtate. 1 *Veſ.* 522. 1750. *Piers* v. *Piers.*

6. Where tenant for life pays off an incumbrance upon the eſtate, he ſhall be conſidered as a creditor for the money ſo paid; but where the tenant in tail pays, it is in exoneration of the eſtate of which he may make himſelf abſolute owner. 1 *Bro. Ch. Rep.* 206. 1783. *Jones* v. *Morgan.* See 7 *Bro. P. C.* 136.

7. The rule impoſing upon the tenant for life a groſs ſum, part of the capital of incumbrances, is at an end, but he takes ſubject to all the intereſt. 5 *Veſ. jun.* 107. 1799. *Lord Penrhyn* v. *Hughes, vide* 1 *Veſ. jun.* 234. 1790. *Counteſs of Shrewſbury* v. *Earl of Shrewſbury*, 4 *Veſ. jun.* 33. 1798. *White* v. *White*, S. P.

(L) Diſputes between Mortgagee and Aſſignee of Mortgagee. 15 Vin. 452.

Vide Letters *F. H. I.* and other proper titles.

15 Vin. 452. (M) Proviſo. To make Intereſt Principal, or to enlarge or leſſen it.

1. *A.* Lends money upon a mortgage at a certain rate of intereſt, and afterwards by parol agrees to reduce the rate of intereſt; this agreement, though not in writing, is binding; but the fact ought to be tried by a jury upon a proper iſſue. 6 *Bro. P. C.* 580. 1773. *Lord Milton* v. *Edgworth and others.*

2. Where a mortgage is at four *per cent.* and a half intereſt, with a proviſo, that if the intereſt be paid after each half year, before three quarters of a year become due, the mortgagee will accept four *per cent.*; if the mortgagor fails in paying the intereſt at the appointed time he cannot be relieved. 3 *Atk.* 519. 1747. *Nicholls* v. *Maynard.*

3. Where a mortgage is made with a reſervation of four *per cent.* intereſt, and a proviſo, that on non-payment thereof within a certain time after it is due, the mortgagor ſhall pay five, this is but a *nomine pœnæ* and relievable in equity. *Ibid.*

15 Vin. 452. (N) Payment or Tender. By whom.

1. MONEY due upon a mortgage is a debt of the mortgagor, to the payment whereof his perſonal eſtate is primarily liable, (the land being conſidered only as a pledge,) as between his heir or deviſee, and his executor; unleſs ſome expreſs, or neceſſarily implied declaration of his exempts his perſonal eſtate and throws the charge upon the real. 6 *Bro. P. C.* 520. 1772. *Earl of Belvidere* v. *Rochfort.* See alſo *Bunb.* 301. *Fereyes* v. *Robertſon,* and *Walker* v. *Jackſon, in notis,* and 2 *Atk.* 624. 424. *Ibid. Galton* v. *Hancock. Haſlewood* v. *Pope,* 3 *P. Wms.* 322, and the caſes there cited. *Bridgeman* v. *Dove,* 3 *Atk.* 201. *Ambl.* 33. *Lord Inchiquin* v. *French,* 1 *Bro. Ch. Rep.* 145. *Samwell* v. *Wake, Ambl.* 115. *Parſons* v. *Freeman. Woods* v. *Huntingford,* 3 *Veſ.* 128. *Marchioneſs Dowager of Tweedale* v. *Earl of Coventry,* 1 *Bro. Ch. Rep.* 240.

2. Teſtator deſires all his debts may be diſcharged by his executors; adding, "I mean thoſe only of my own contracting, not thoſe heavier debts of my family;" gives his perſonal eſtate to his mother, whom he makes executrix, deſiring her to pay all his juſt bebts exactly. Long after making the will the mother buys in mortgages charged on his eſtate by his anceſtors, and the ſon covenants to pay the money. The perſonal eſtate is ſtill exempted from the principal and intereſt due on thoſe mortgages, which are ſtill a charge on the real. 1 *Veſ.* 51. 1747. *Leman* v. *Newnham.*

3. Where money is borrowed on the wife's eſtate, partly to pay *her* debts, and partly for the huſband's uſe; he ſhall not indemnify her eſtate againſt any part of it. Otherwiſe, if it were borrowed

borrowed for his uſe only, but there is no inſtance, where the whole is borrowed for the huſband, that he is bound to indemnify her eſtate, if at the ſame time he made a ſettlement upon her. *Ambl.* 150. 1752. *Lewis* v. *Nangle.*

4. Two perſons buy eſtates ſubject to a mortgage made by the former owners, they take upon themſelves different mortgages, and covenant with each other for the payment of them, they do not by that means make their perſonal eſtate liable. *Ambl.* 171. 1753. *Forreſter* v. *Lord Leigh.*

5. Notwithſtanding a charge upon a term for payment of debts, a leaſehold eſtate purchaſed by the teſtator, ſubject to a mortgage, ſhall bear the burthen of that mortgage, it not being properly the debt of the teſtator. 1 *Bro. Ch. Rep.* 454. 1784. *Duke of Ancaſter* v. *Mayo and others. Vide* 2 *Bro.* 57. *Earl of Tankerville* v. *Fawcett,* 2 *Bro. Ch. Rep.* 101. *Tweedale* v. *Tweedale,* 3 *Veſ. jun.* 103. *Gray* v. *Minnethorpe, Brummel* v. *Prothero, Ibid.* 111. *Read* v. *Litchfield, Ibid.* 475. See alſo Mr. *Cox*'s note to *Evelyn* v. *Evelyn,* 2 *P. Wms.* 664.

6. The teſtator deviſed his real eſtate to be ſold, and the money to ariſe by the ſale to be applied to pay mortgages and other debts, the reſidue to be added to his perſonal eſtate; and it was decreed to be ſold, though there were no expreſs words to exonerate the perſonal eſtate. 2 *Bro. Ch. Rep.* 60. *Webb* v. *Jones.*

7. There being a proviſion in a ſettlement of 5000*l.* for a child at 21, the father by will added 5000*l.* more, and charged all on a reſiduary real fund, which he had alſo made liable to debts and legacies, in aid of his perſonal eſtate; the charged eſtate ſhall not be exonerated by the perſonal eſtate. 2 *Bro. Ch. Rep.* 316. *Ward* v. *Lord Dudley and Ward.*

8. Where one deviſed a rectory for lives, ſubject to a charge, although the leaſe be changed by adding new lives, and a bond given by the owners of the leaſe to the deviſee, it continues a charge on the church leaſe, and not on the perſonal eſtate of the obligor in the bond. 2 *Bro. Ch. Rep.* 604. 1789. *Billingburſt* v. *Walker.*

(O. 2) Payment or Tender, what is good. 15 Vin. 456.

1. NOTICE of paying off a mortgage muſt be given to the mortgagee at leaſt ſix calendar months before, and the money muſt be tendered on the day of the determination of that notice: for where the mortgagee omitted to tender the money on the *very* day on which the notice expired, and, in conſequence thereof, the mortgagee refuſed the tender, the payment of the intereſt was held by Lord *Hardwicke* not to be *thereby* ſuſpended; for that by the omiſſion of the mortgagor, the mortgagee was become entitled to a further notice of *ſix calendar months,* at the expiration of which a ſtrict tender muſt be made. *Hix* v. *Ling, Powell on Mortgages,* 412.

2. Where there are covenants in a deed of aſſignment on the part of the mortgagee, he may refuſe to take the principal and intereſt though tendered, till he has an opportunity of adviſing with his attorney whether he may ſafely execute. 3 *Atk.* 89. 1744. *Wiltſhire* v. *Smith.*

3. There are ſeveral inſtances of mortgages, where there are many attempts by a mortgagor to pay them off, and reaſonable offers of payment; yet if a ſtrict tender is not made, the court cannot ſtop the intereſt: though caſes may be where the court wiſh to do it. That of acting a more generous kind of part, if mortgagee had taken it, is not what the court is to go by. *Per* Lord *Hardwicke*, 2 *Veſ.* 372. 1751. *Biſhop* v. *Church.*

4. Intereſt on a mortgage not ſtopped, but on a proper tender and notice. Not upon propoſals to deduct upon an open account on the other ſide. 2 *Veſ.* 678. 1755. *Garforth* v. *Bradley.*

15 Vin. 457.

(P) Diſcharged, by what Act.

IF a mortgage be found cancelled in the hands of the mortgagee, it is as much a releaſe as a cancelling the bond. 1 *Atk.* 520. 1738. *Harriſon* v. *Owen.*

15 Vin. 457.

(Q) Redemption, by whom.

1. A Mortgagor may redeem his mortgage, even though he has covenanted, or even taken an oath not to redeem. *Comyns's Rep.* 348. 7 *G.* 1. *Eaſt. Term. Com* v. *Atkyns.*

2. The crown may redeem eſtates mortgaged, forfeited for high treaſon by the mortgagor. 1 *Bro. P. C.* 222. 1708. *Attorney-General* v. *Crofts and others.*

3. Mortgage by a popiſh peer may be redeemed by the next proteſtant kin. *Bunb.* 346. 1739. *Jones* v. *Meredith and others, Comyns's Rep.* 661.

4. One who claims under a voluntary conveyance may redeem a mortgage. *Comyns's Rep.* 669. *Ibid.*

5. A huſband may be tenant by the curteſy of an equity of redemption. 1 *Atk.* 603. *Caſborne* v. *Scarfe and others.*

6. A mortgagee till he is fully ſatisfied principal, intereſt, and coſts, is not obliged to quit poſſeſſion to a purchaſer. 2 *Atk.* 2. 1737. *Dewy* v. *Barker.*

7. *G. H.* in 1693 confeſſed a judgment, but it was not to take place till after the death of a woman who lived till 1726. The eſtate, ſubject to this judgment, deſcended to *J. H.*, who mortgaged it to the defendant, and in 1721 became a bankrupt, five years before the judgment was to take place. Lord *Hardwicke*, Chancellor, held the repreſentative of the judgment creditors, and not the aſſignee under the commiſſion entitled to redeem, and to have the eſtate of *G. H.* exonerated out of the eſtate of

of *J. H.*, if ſufficient. 2 *Atk.* 440. *Nov.* 1742. *Stonehewer* v. *Thompſon.*

8. A judgment creditor before he is entitled to redeem a mortgage of a leaſehold eſtate and bond creditor muſt take out execution. 3 *Atk.* 200. 1744. *Shirley* v. *Watts.*

9. Before execution on a judgment obtained againſt *D.* on an action upon a promiſe of marriage, he by mortgage conveys his whole eſtate to the defendant; the court would only allow the plaintiff to redeem the defendant. 3 *Atk.* 192. 1744. *King* v. *Mariſſal.*

10. Tenant in tail pays off an incumbrance by mortgage, but takes no aſſignment; the remainder-man over ſubject to pay it to his repreſentatives. 1 *Veſ.* 258. 1749. *Mirkham* v. *Smith.*

In 1 *Brown.* 218. *Lord* Thurlow *held, on the authority of this caſe, and of* Ameſbury *and* Brown, 3 *Veſ.* 477. *that tenant in tail paying off an incumbrance is only inference, that he meant to exonerate the eſtate, and evidence may be produced to ſhew the contrary. The rule of law is, where tenant for life pays off an incumbrance, he ſhall be creditor for the money; but where tenant in tail pays, it is in exoneration of the eſtate, of which he may make himſelf abſolute owner.* Ibid. in notis.

11. Equity of redemption will follow the cuſtom of a copyhold as to the legal eſtate, as it does Burrough *Engliſh* lands; which if mortgaged, the equity of redemption will deſcend to the youngeſt ſon: ſo in a mortgage of *gavelkind*, the equity of redemption will deſcend to all. 2 *Veſ.* 304. 1751. *Fawcet* v. *Lowther.*

12. A prior mortgagee may tack a ſubſequent judgment; *not e contra*—may tack a bond againſt the *heir* of the mortgagor, but not againſt mortgagor himſelf or creditors. 2 *Veſ.* 662. 1755. *Anon.* *Vide* letters C, D, and E.

(R. 2) Redemption of what.

15 Vin. 461.

1. THE bill in this caſe was brought by the plaintiff as repreſentative of Sir *Thomas Cooke* to redeem the ſum of 2500 *l.* *Eaſt India* ſtock, transferred to Mr. *Ewer* the firſt of *April* 1708, for ſecuring the ſum of 2000 *l.* and intereſt at 6 *per cent.*; Mr. *Ewer* having executed a defeazance, whereby he obliged himſelf to re-transfer the ſtock on payment of the 2000 *l.* and intereſt on the 2d of *July* following. Sir *Thomas Cooke* died in 1709; and the bill was brought in 1729; and Lord *Hardwicke* refuſed to decree a redemption, and diſmiſſed the bill. 2 *Atk.* 303. 1742. *Lockwood and others* v. *Ewer.*

2. A petition was preſented on behalf of a mortgagor, that the mortgagee of a naked advowſon may accept of his nominee and preſent him upon an avoidance, the incumbent being dead; which was ordered. 3 *Atk.* 559. 1747. *Mackenzie* v. *Robinſon.*

15 Vin. 464.

(T) Redemption. On what Terms.

1. DEFENDANT has a prior judgment, and a mortgage likewiſe upon the eſtate of *B.*; a ſuſequent judgment creditor, but prior in time to the mortgage, brings his bill, and prays a ſale of the mortgagor's eſtate, who is likewiſe willing and deſirous to ſell; but as the mortgagee had no notice of ſuch judgment, the court would not direct a ſale in favour of the creditor on the ſecond judgment, unleſs he would pay off principal and intereſt on the firſt judgment and mortgage. 1 *Atk.* 520. 1739. *Sir Hugh Smithſon* v. *Thompſon.*

2. Where a mortgagee was preſent whilſt a mortgagor was in treaty for his ſon's marriage, and concealed his mortgage, the court decreed in favour of the ſon, the wife, and the iſſue. 2 *Atk.* 49. 1740. *Bereford* v. *Milward.*

3. The rule of the court as to prior incumbrancers taking in a ſubſequent one, ſo as to tack it to the prior, is where he is a *bona fide* purchaſer of the puiſne incumbrance without notice of intermediate ones. 2 *Atk.* 53. 1740. *Morret* v. *Paſke.*

4. If a prior mortgagee takes an aſſignment of a third mortgage, as a truſtee only for another perſon, he ſhall not be allowed to tack the two mortgages together to the prejudice of intervening incumbrancers. *Ibid.*

5. The reaſon why a mortgage may be tacked to a judgment is this, becauſe the judgment creditor, by virtue of an elegit, may bring an ejectment, and hold upon the extended value; and as he has the legal intereſt in the eſtate, the court will not take it from him; but this holds only where the ſame perſon has both judgment and mortgage in the ſame right, and not where he has the judgment in his own right, and the mortgage in another right, as a truſtee only. *Ibid.*

6. Where there is a prior mortgagee, who has a puiſne incumbrance, a ſecond mortgagee ſhall not redeem the prior without redeeming the puiſne at the ſame time; and the reaſon is, becauſe the legal eſtate is in the firſt mortgagee, and the court will not take away that benefit from him, provided he had no notice of the ſecond, at the time he bought in the puiſne one. *Ibid.*

7. Where a mortgagee has a bond likewiſe from the mortgagor, the heir muſt diſcharge the one as well as the other. *Ibid.*

8. Where a prior incumbrancer has a bond likewiſe, it ſhall be poſtponed to all other incumbrances, whether by mortgage, judgment, or ſtatute ſtaple. *Ibid.*

9. A prior creditor, who buys in a puiſne incumbrance, though he did not give the full value, ſhall be allowed the whole, otherwiſe as to a truſtee, agent, heir at law, or executor. *Ibid.*

10. *Thomas Matthews* gave the plaintiffs at different times three notes, one for 450*l.*, another for 250*l.*, and the laſt for 150*l.*, and expreſſed in each to be ſecured by mortgage on my *Stoke-Hall* eſtate;

eſtate; the drawer of the notes had before mortgaged the ſame eſtate to the defendant; the plaintiff takes in a prior mortgage to protect the ſums lent upon the notes. Lord *Hardwicke* held there was nothing to differ this caſe from the common one, and that the defendant ſhould be paid the money lent upon the notes in the firſt place, as well as the money due upon the aſſignment of the prior mortgage. 2 *Atk.* 347. 1742. *Mathews* v. *Cartwright.*

11. A prior mortgagee may tack a judgment to his mortgage, though ſubſequent in time to a ſecond mortgage, provided he has no notice of the ſecond. 2 *Atk.* 352. *Shepherd* v. *Titley.* 1742. See 2 *Veſ.* 662. *Anon,* S. P.

12. Lord Chancellor *Hardwicke* ſaid he was inclined to think that the limitation in a ſettlement to *W. R.* for life, and to the uſe of the heir male of his body, had created an eſtate tail in him, and that the plaintiff has not the legal title to the eſtate, and if he had, that he was not entitled to come into equity for deeds and writings till he had eſtabliſhed it firſt at law, and therefore diſmiſſed the bill ſo far as it prays to ſet aſide the mortgage, but left him at liberty to redeem the aſſignee of the mortgage. 3 *Atk.* 291. 1745. *Warrick* v. *Warrick.*

13. The rule of the court as to a mortgagee, who is likewiſe a bond creditor, is that he may tack it to the mortgage as againſt the heir, becauſe aſſets being deſcended, he cannot redeem one without paying off the other. 3 *Atk.* 556. 1747. *Powis* v. *Corbett.*

14. A mortgagee, who lent a further ſum upon bond, ſhall not be allowed to tack it to his mortgage in preference to creditors under a truſt created by the will of the mortgagor for payment of debts. 3 *Atk.* 630. 1748. *Heanes* v. *Bauce.*

15. The reaſon why the heir of the mortgagor ſhall not redeem the mortgage, without paying the bond likewiſe, is to prevent circuity, becauſe the moment the eſtate deſcended, it became aſſets and liable to the bond; the ſame rule will hold as to a deviſee of the mortgaged premiſes. *Ibid.*

16. Where there is a purchaſer for a valuable conſideration without notice of a mortgage, the mortgagee cannot tack his bond to it, and he can only have it out of the general aſſets of the mortgagor. 3 *Atk.* 659. 1747. *Troughton* v. *Troughton.* 1 *Veſ.* 46. S. C.

17. A third mortgagee cannot buy in a prior ſecurity to diſplace a ſecond mortgagee after a decree to account, and before the Maſter has made his report. 3 *Atk.* 811. 1754. *Wortley* v. *Birkhead.* 2 *Veſ.* 571. S. C.

18. Where there is a clauſe of redemption in a ſeparate deed, the court adheres to it ſtrictly to prevent the equity of redemption from being entangled to the prejudice of the mortgagor. 1 *Veſ.* 160. 1748. *Baker* v. *Wind.*

19. The huſband of tenant in tail takes in a mortgage, and is in receipt of the rents; on a bill to redeem by the reverſioner after the

the wife's death, the husband shall not be allowed interest on the mortgage during the life of the wife. 1 *Ves.* 477. 1750. *Amesbury* v. *Brown.*

20. A deed of appointment of lands in *Middlesex*, pursuant to a power in a former deed, postponed to a mortgage subsequent to, but registered before it. 2 *Ves.* 413. 1752. *Scrafton* v. *Quincey.*

21. A second mortgagee with notice of a former, but without notice of a trust charge antecedent to both, of which the first mortgagee had notice, must take subject to that demand. 2 *Ves.* 485. 1752. *Earl of Pomfret* v. *Lord Windsor.*

22. Judgment creditor being plaintiff in equity shall have satisfaction against the heir at law out of a moiety only of the land; but if the heir at law comes to redeem a mortgage, and the mortgagee has a judgment besides his mortgage, he must redeem both. *Ambl.* 14. 1743. *Stileman* v. *Ashdown.*

23. Two separate mortgages of different estates to the same person; a purchaser of the equity of redemption of one of them cannot redeem the mortgage upon that estate only; he must redeem both. *Ambl.* 733. 1773. *Ex parte Carter.*

24. Executor of a mortgagee lends money to the mortgagor on bond, he may tack the bond to the mortgage as against the heir or devisee of the mortgagor, but not against creditors, if the estate is charged with the payment of debts. *Ambl.* 685. 1770. *Price* v. *Fastnedge.*

25. The third mortgagee, buying in the first mortgage *pendente lite*, shall exclude the second. 1 *Bro. Ch. Rep.* 63. 1779. *Robinson* v. *Davison.*

26. Where the legal estate is in a mortgagee, the subsequent securities shall have priority. 1 *Bro. Ch. Rep.* 353. *Becket* v. *Cordley.*

27. Mortgagee of a reversion not having the title deeds shall not be postponed to a subsequent mortgagee (whose mortgage was made after the mortgagor came into possession) having the title deeds, there being neither fraud nor negligence. 2 *Bro. Ch. Rep.* 650. 1789. *Tourle* v. *Rand.* *Vide Penner* v. *Jemmatt*, and *Edwards* v. *Applebee, in notis.*

28. Mortgagee having also a bond, cannot tack it against other specialty creditors, though he may against the heir. 3 *Bro. Ch. Rep.* 162. 1796. *Lowthian* v. *Hasel.* *Hamerton* v. *Rogers*, S. P. 1 *Ves. jun.* 513.

29. Personal securities pledged for a specific debt after a mortgage to the creditor; the same securities with others were pledged to him for the balance of an account; the transaction being distinct, redemption of the personal securities was decreed without discharging what was due on the mortgage. 2 *Ves. jun.* 372. 1794. *Jones* v. *Smith.*

30. *A.* engaged with *B.* in one mortgage only, may redeem, though *B.* has pledged another estate to the same person. *Ibid.* 376.

31. Two mortgages to the same person absolute at law; mortgagee may insist that both or neither shall be redeemed by the mortgagor or his assignee. *Ibid.*

32. A bond

32. A bond cannot be tacked to a mortgage againſt the mortgagor or creditors; but may againſt the heir, merely to prevent circuity of action. 2 *Veſ. jun.* 376. 1794. *Jones* v. *Smith.*

33. Mortgagee may protect himſelf againſt a claim of dower by tacking an aſſignment of an old mortgage term prior to the right to the dower. 5 *Veſ. jun.* 426. 1799. *Wynn* v. *Williams.*

(U) Redemption. *At what Time.* 15 Vin. 467.

1. A Redemption of a ſtale mortgage was decreed after the mortgagee had been in poſſeſſion 68 years; but this decree being made upon a bill of revivor, was held to be improper, and therefore reverſed, without prejudice however to the queſtion, whether the eſtate was redeemable or not, whenever it ſhould be brought into queſtion by a proper bill. 2 *Bro. Par. Caſ.* 44. 1717. *Dame Anna Dorothea Birne* v. *Hartpole and others.*

2. The heir of a mortgagor brings his bill to redeem an old mortgage. The defendant pleads title as a purchaſor for a valuable conſideration under a marriage ſettlement, without notice of the mortgage. The ſettlement was made by the original mortgagee, and there was a quiet poſſeſſion for 70 years. The plea was allowed. 4 *Bro. Par. Caſ.* 74. 1732. *Lord Dunſany* v. *Shaw.*

3. Where the mortgage money is ſtipulated to be paid in one entire ſum, and the mortgagee, and thoſe claiming under him, had been in poſſeſſion for near 100 years without foreclofing; a bill brought to redeem ſhall be diſmiſſed with coſts. 4 *Bro. Par. Caſ.* 369. *Hartpole* v. *Walſh and others*, 1740.

4. On a bill filed to redeem a mortgage, 55 years after the date of it, 47 years after the mortgagee had got into poſſeſſion, after five ejectments brought to defeat his eſtate by a title paramount, and after refuſing by four different anſwers to come to account on the foot of the mortgage and redeem the lands; a redemption was decreed, and an account of rents and profits directed. 5 *Bro. Par. Caſ.* 194. 1756. *Palmer* v. *Jackſon.*

5. Upon a bill to redeem, it appeared by the plaintiff's own ſhewing, that the defendant had been in an uninterrupted poſſeſſion above 34 years, and no incapacity was pretended; a demurrer was allowed. *Bunb.* 55. 1719. *Fraſer and others* v. *Moor.*

6. Mr. *North* had been in poſſeſſion as mortgagee ſince 1686. In the year 1720 a bill was brought by the repreſentative of the mortgagor for a redemption. Mr. *North* filed a bill for a foreclofure, and upon hearing, the uſual decree was made, that he ſhould account, have all juſt allowances, and be examined on interrogatories, which he was; and it appeared thereby, that the eſtate was indebted to him above 5000*l.*; now it was moved for the plaintiff, that the defendant ſhould produce all books, writings, and papers relating to the account on oath, which the court ordered

dered as to books and papers, but made no order as to the writings relating to the title. *Bunb.* 288. 1730. *Dean, clerk* v. *North.*

7. After a poſſeſſion of a mortgagee for 25 years, the court decreed a redemption, on the defendant's ſubmitting by his anſwer to be redeemed. 2 *Atk.* 140. 1740. *Procter* v. *Oates.*

8. Where no demand has been made upon a bond for 20 years, the judge will direct a jury to find it ſatisfied. 2 *Atk.* 144. 1740. *Gratwick* v. *Simpſon and others.*

9. The repreſentative of Sir *T. C.* prays to redeem 2500*l.* *Eaſt India* ſtock transferred to the defendant the firſt of *April* 1708 for ſecuring 2000*l.* and intereſt at 6 *per cent.*, to be re-transferred on payment of principal and intereſt the 2d of *July* following. Sir *T. C.* died 1709; the ſon brought the bill in 1729. Lord *Hardwicke* refuſed to decree a redemption, and diſmiſſed the bill. 2 *Atk.* 303. 1742. *Lockwood* v. *Ewer.*

10. Length of time pleaded in bar to a redemption of a mortgage being made in 1713, the mortgagee's ſolicitors appearing to have ſettled an account in 1730, in order to pay off the mortgage; Lord *Hardwicke* held, that that would ſave the right of redemption. 2 *Atk.* 333. 1742. *Anon.*

11. Coverture is no excuſe for not redeeming a mortgage; for if a woman becomes afterwards diſcovert, the ſtat. of limitations will run from that time. *Ibid.*

12. Tenancy by the curteſy is no excuſe, for it is of no conſequence to a mortgagee, who has the equity of redemption; if they do not make uſe of their right, they ſhall be barred. *Ibid.*

13. Premiſes are conveyed to a mortgagee, *till he ſhall have received by the rents and profits* the money which he has advanced, and intereſt; this was redeemable after 40 years, for the mortgagee took the eſtate ſubject to a perpetual account. 2 *Atk.* 363. 1742. *Yates* v. *Hambly.*

14. In common *Welch* mortgages, on tendering principal and intereſt, the perſon entitled may come into this court for redemption at any time. *Ibid.* See 1 *Veſ.* 406.

15. A plea of the ſtat. of limitations allowed to a bill for redemption after a mortgagee had been in poſſeſſion of the mortgaged premiſes 30 years. 3 *Atk.* 225. 1745. *Aggas* v. *Pickerell.*

16. The rule in relation to redemptions eſtabliſhed in equity by way of analogy to the ſtat. of limitations, is, that after 20 years poſſeſſion a mortgage ſhould not be diſturbed, is a very right and proper one. 3 *Atk.* 313. 1746. *Anon.*

17. A pawner has time for redemption during life, where no time is given for redemption. 1 *Veſ.* 278. 1749. *Kemp* v. *Weſtbrook.*

18. If a mortgagee admits having no other title, it ſhall bind him, and the court will let in the mortgagor to redeem after 20 years; not ſo, if he claim by a better title. 2 *Bro. Ch. Rep.* 397. 1788. *Perry* v. *Marſton.*

19. Bill

19. Bill againſt the deviſee of mortgaged premiſes by the heir of the mortgagor for diſcovery and redemption, charging acknowledgments that the eſtate was held in mortgage, and that accounts had been kept: plea of poſſeſſion for 50 years under conveyances from the mortgagee ordered to ſtand for an anſwer. 3 *Veſ. jun.* 17. 1795. *Lake* v. *Thomas.*

20. A mortgaged eſtate getting into different hands, redemption was refuſed as to part from length of time, and opened as to the other part, accounts having been kept, and there being a deviſe of it as a mortgage. *Ibid.*

21. Reſiduary legatee having been admitted to a copyhold eſtate, was in poſſeſſion above 19 years, when the heir obtained poſſeſſion by ejectment. After acquieſcence for 9 years, the reſiduary legatee filed a bill claiming the eſtate, as having been a redeemable intereſt in the teſtator, and having been treated as ſuch, it was decreed. An account was directed of the money expended in repairs, &c. and inquiries as to incumbrances, the court inclining ſtrongly to ſupport the acts of the heir whilſt in poſſeſſion. 4 *Veſ. jun.* 466. 1799. *Hardy* v. *Reeves.*

22. Baron and feme ſeiſed in fee in right of the feme, mortgage by fine, and afterwards convey the equity of redemption by leaſe and releaſe to the mortgagee, the mortgagee having remained in poſſeſſion for more than 20 years, during the life of the huſband, tenant by the curteſy, the heir of the wife is barred of his equity of redemption by lapſe of time. 1 *Anſtr.* 138. 33 *G.* 3. *Corbett* v. *Barker*, 755. S. C.

(U. 2) Redemption. *How.* In Caſes of Ejectment, *&c.* by 7 *G.* 2. *c.* 20.

15 Vin. 471.

WHERE a mortgagee brings an ejectment to get poſſeſſion, and the mortgagor moves to ſtay proceedings on payment of what is due, and coſts: if the mortgagee gives notice of other demands, as cauſe againſt the order, he muſt ſpecify the nature and amount of ſuch demands. 3 *Anſtr.* 937. 37 *G.* 3. *Goodtitle on dem. Leon* v. *Louſdown.*

(U. 3.) Equity of Redemption. Diſpoſable. *How, &c.*

15 Vin. 471.

1. QUÆRE, Whether a mortgage on real eſtate can paſs by parol gift as *donatio inter vivos.* *Ambl.* 318. 1756. *Haſſell* v. *Tynte.*

2. An equity of redemption may be conveyed by bargain and ſale. 2 *Atk.* 15. 1737. *Oldin* v. *Samborne.*

3. An equity of redemption cannot be taken in execution under the ſtatute of frauds. 3 *Bro. Ch. Rep.* 398. 1792. *Lyſter* v. *Dolland*, 1 *Veſ. jun.* 431. S. C.

4. Whether

4. Whether there can be an eſcheat of an equity of redemption, or truſt is not yet determined. 2 *Veſ.* 304. 1751. *Fawcet* v. *Lowther.*

25 Vin. 471. (W) Account. In what Caſes. *Mortgagee* ſhall account for the Profits.

1. A Mortgagee of a leaſehold eſtate getting poſſeſſion by ejectment, is liable to the leſſor for all arrears of the reſerved rent; and where, to exonerate himſelf, he prevails with the leſſor to diſtrain upon the goods of the leſſee, which are already taken in execution by a judgment creditor, he ſhall pay to ſuch creditor ſo much as he has been obliged to pay to the leſſor, with damages and coſts. 1 *Bro. Par. Caſ.* 105. 1705. *Traherne* v. *Sadleir.*

2. The court will not allow a mortgagee more than his principal and intereſt, notwithſtanding the mortgagor has agreed that he ſhall be paid for his trouble in receiving the rents. 2 *Atk.* 120. 1740. *French* v. *Baron.* See 3 *Atk.* 518. *Godfrey* v. *Watſon.*

3. The court will not ſuffer a common mortgage to be redeemed, where the mortgagee has been in perception of the rents and profits for a conſiderable time, becauſe it would be making the mortgagee bailiff to the mortgagor, and ſubject to account. 2 *Atk.* 496. 1742. *Mellor* v. *Lees.*

But where a mortgagee takes an eſtate ſubject to a perpetual account, as in the caſe of common Welch *mortgages, he cannot be relieved againſt his own contract.* 2 Atk. 363. 1742. Yates v. Hambly.

4. A leaſe of 60 years which had been granted as a collateral ſecurity to a recognizance for 3500*l.* being expired, the plaintiff by his bill prayed to be let into poſſeſſion, and the ſecurity might be vacated, or ſatisfaction entered on record: the account was directed to be taken of the rents which have accrued ſince the expiration of the leaſe and received by the defendant, and to be deducted out of the principal intereſt and coſts, and the plaintiff decreed to be entitled to a conveyance of the inheritance of the eſtate in queſtion, and poſſeſſion, on payment of what ſhall be found due. 3 *Atk.* 261. 1743. *Toomes* v. *Conſet.*

5. It is the conſtant practice of the court in decrees againſt a mortgagee, upon a bill for redemption, or againſt an executor to account, to direct it without future words, *viz.* to account for what they had received, or might have, if it had not been for their own default; and yet if the perſon decreed to account receive any thing ſubſequent to the decree, it is inquirable before the Maſter, and the defendants in each caſe muſt bring the ſums received to account. 3 *Atk.* 582. *Nov.* 1747. *Bulſtrode* v. *Bradley.*

(X) Allowances to Mortgagee. 15 Vin. 474.

1. THE court will not allow a mortgagee more than his principal and intereſt, notwithſtanding the mortgagor has agreed he ſhall be paid for his trouble in receiving the rents. 2 *Atk.* 120. 1740. *French* v. *Barron.*

2. Where a mortgagor of a leaſehold eſtate has not covenanted that he will procure the lives to be filled up, the mortgagee may do it, and on adding the expence of renewal to the principal of the mortgage it ſhall carry intereſt. 3 *Atk.* 4. 1743. *Lacon* v. *Mertins.*

3. Mortgagee may add to the principal of his debt a ſum expended in ſupport of the mortgagor's title, where it is impeached, and it ſhall carry intereſt. 3 *Atk.* 518. 1747. *Godfrey* v. *Watſon.*

4. A mortgagee ſhall not be allowed for his trouble in receiving the rents of the eſtate himſelf, but if the eſtate lies at ſuch a diſtance as obliges him to employ a bailiff to receive them, what he paid to the bailiff ſhall be allowed. *Ibid.*

5. Bill to redeem a mortgage. It was referred to the Maſter to take the uſual accounts. The principal money lent, carried 5 *per cent.* intereſt. The mortgagee being in poſſeſſion, had advanced money for fines on renewals of leaſes, under which the premiſes were held. Upon theſe ſums the Maſter allowed only 4 *per cent.* intereſt. On exceptions, the court ſaid, that intereſt upon the advances muſt be regulated by the intereſt payable upon the money originally lent. 2 *Anſt.* 551. 35 *Geo.* 3. *Woolley* v. *Drag.* See 2 *Atk.* 330. *Thornhill* v. *Evans.*

6. A mortgagee had alſo a bond, on which the intereſt due exceeded the penalty; the mortgagor conveyed the equity of redemption for the uſe of his creditors, paying this bond firſt, nothing beyond the penalty can be allowed. 2 *Anſt.* 525. 33 *G.* 3. *Lloyd* v. *Hatchett.*

(X. 3) *Intereſt upon Intereſt.* Or how much. 15 Vin. 474.

1. AN arrear of intereſt remaining due at the time of aſſigning a mortgage ſhall not carry intereſt. 2 *Bro. Par. Ca.* 56. 1717. *Everard* v. *Aſton.*

2. *A.* made a mortgage to *B.* for 1769*l.* payable by five equal payments within the ſpace of five years, with intereſt at 5 *per cent.* But the mortgagor covenanted, that if the money was not paid at thoſe times, or within three months after, he would, for every ſum ſo paid pay the mortgagee intereſt after the rate of 8 *per cent.* until actual payment. The money was not paid according to the terms of the deed, and therefore the mortgagee filed a bill to foreclose. The court decreed an account of the principal money and intereſt at 5 *per cent.* only; but on appeal this decree was reverſed, and the mortgagor was ordered to be charged at 8 *per cent.*

cent. from the end of three months after each payment became due. 3 *Bro. Par. Ca.* 68. 1725. *Burton and others* v. *Hattery.*

3. A mortgagee, where the mortgage was only at four and a half *per cent.* compelled the mortgagor to turn the intereſt into principal at five *per cent.* at the end of every ſix months, and at the time the mortgage was paid off inſiſted on an advance of ſix months intereſt, over and above the intereſt which was due; the bill was brought for relief againſt the mortgagee, and to ſet aſide the grant to the defendant of the place of ſteward to a manor of the plaintiff's, as obtained by fraud. Lord *Hardwicke* Chancellor, relieved the plaintiff both in reſpect of the tranſactions relating to the mortgage, and alſo in regard to the grant to the ſtewardſhip. 2 *Atk.* 330. 1742. *Thornhill* v. *Evans.*

4. An agreement to turn intereſt into principal muſt be done fairly, and on the advance of freſh money. *Ibid.*

5. The court will not ſuffer a counſel to maintain an action for fees, or if he happen to be a mortgagee, to inſiſt on more than legal intereſt under pretence of gratuity for buſineſs done in the way of counſel. *Ibid.*

6. Though intereſt be in arrear when the mortgage is paid off, a mortgagee ſhall not have intereſt for that intereſt. *Ibid.*

7. If a mortgage be drawn for 5 *per cent.* and a mortgagee take 6, it would be void on the word *take* in the ſtat. 12 *Ann.* 3 *Atk.* 154. 1744. *Adlington* v. *Cann.*

8. The defendant, the aſſignee of two judgments, which were prior in point of time to the plaintiff's mortgage, is entitled to have intereſt on the whole money, the accumulated ſum which he paid for thoſe two judgments. 3 *Atk.* 270. 1745. *Aſhenhurſt* v. *James.*

9. Where a mortgage is aſſigned with the concurrence of the mortgagor, the intereſt paid to the mortgagee by the aſſignee ſhall be taken as principal and carry intereſt; otherwiſe if aſſigned without the mortgagor's conſent. *Ibid.*

10. A judgment creditor in poſſeſſion of the eſtate, and prior to a mortgage aſſigns his judgment; the aſſignee's poſſeſſion is from the date of the aſſignment only, but the rents he has received, ſhall be deducted out of what ſhall be reported due to him for principal, intereſt, and coſts. *Ibid.*

11. Where a mortgagee has tacked a judgment to his mortgage he ſhall not be confined to the penalty of the judgment, but is entitled to intereſt upon the debt ſecured by judgment, though it exceeds the penalty. 3 *Atk.* 518. 1747. *Godfrey* v. *Watſon.*

12. Prior incumbrancer cannot turn the intereſt into principal to the prejudice of a ſubſequent incumbrancer after notice. *Ambl.* 612. *June* 1763. *Digby* v. *Craggs.*

15 Vin. 475. (Y) *Foreclosure. In what Caſes, and of what, &c.*

1. THE father of Mr. *Lutwich* the counſel, had a mortgage in fee on Sir *Wm. Perkin*'s eſtate, who was attainted, the ſon of Mr. *Lutwich* brought his bill to foreclose, and made the *At-*

torney General a party: the court would not decree a foreclosure againſt the crown, but directed the mortgagee ſhould hold and enjoy till the crown thought proper to redeem the eſtate. 2 *Atk.* 223. 1741. *Reeve* v. *The Attorney-General.*

2. It is not neceſſary to bring a bill of foreclosure on a mortgage of ſtock. 2 *Atk.* 303. 1742. *Lockwood* v. *Ewer.*

3. Bill of foreclosure againſt tenant for life and firſt tenant in tail; the time for redemption after ſeveral enlargements elapſed, and the tenant in tail releaſed; held, the remainder-man was bound by the foreclosure and releaſe. *Amb.* 564. 1769. *Reynboldſon* v. *Perkins.*

4. Foreclosure of the firſt tenant in tail will bind the remainder-man. *Ibid.*

5. Mortgagee, when the perſonal eſtate is inſufficient, may pray a ſale of the mortgaged premiſes in the firſt inſtance, where the heir and the perſonal repreſentative are the ſame perſon. 1 *Bro. Ch. Rep.* 155. 1787. *Daniel* v. *Skipwith.*

6. A truſtee laid out money of different perſons on a mortgage, foreclosure may be by one *ceſtui que truſt* as to his ſhare. 3 *Veſ. jun.* 360. 1797. *Montgomerie* v. *Marquis of Bath.*

7. Mortgagee having permitted the tenant for life to run in arrear for the intereſt, purchaſes the eſtate for life, and takes poſſeſſion under that purchaſe: he is bound to apply the ſurplus rents and profits beyond the current intereſt in diſcharge of the arrear; and in the account under the foreclosure was charged accordingly. 5 *Veſ. jun.* 99. 1799. *Lord Penrhyn* v. *Hughes.*

8. Mortgagee cannot be compelled to take poſſeſſion, but may foreclose. *Ibid.*

(Z) Foreclosure. *Opened* in what Caſes. 15 Vin. 477.

MOTION for further time to redeem a mortgage, and that it ſhould ſtand as a ſecurity only for what was *bonâ fide* advanced, but forfeited as to what was won at play. *Per* Lord *Hardwicke* Chancellor. As Mr. *Fleetwood* in a former cauſe, where he might have done it, did not inſiſt on a redemption, the foreclosures could not regularly be kept open, but on the whole circumſtances his lordſhip allowed three months. 2 *Atk.* 467. 1742. *Fleetwood* v. *Janſon.*

(C. a) Pleadings in Law and Equity relating to Lands mortgaged. 15 Vin. 478.

1. IF a term is aſſigned by way of mortgage, with a clauſe of redemption, the leſſor cannot ſue the mortgagee as aſſignee of all the eſtate, right, title, intereſt, &c. of the mortgagor even after the mortgage has been forfeited, unleſs the mortgagee has taken actual poſſeſſion. *Eaton* v. *Jacques.* 2 *Dougl.* 455.

2. The plaintiff as mortgagee got poſſeſſion of the eſtate, ſued at law on the covenant for non-payment, and brought this bill to foreclose; this is regular, and the court will not ſtop the proceedings at law unleſs the defendant brings the money into court. *Rees* v. *Parkinſon*, 2 *Anſtruther's Rep.* 497.

3. On a bill to redeem, the mortgagee cannot object that the bill does not ſtate a valid legal conveyance to him. *Robert* v. *Clayton*, 3 *Ibid.* 715.

4. Where a mortgagee brings an ejectment to get poſſeſſion, and the mortgagor moves to ſtay proceedings on payment of what is due and coſts; if the mortgagee gives notice of other demands, as cauſe againſt the order, he muſt ſpecify the nature and amount of ſuch demands. *Goodtitle ex dem. Leon* v. *Lansdown.* 3 *Ibid.* 937.

5. The mortgagee of a ſhip cannot maintain an action for freight againſt a third perſon before he takes poſſeſſion. *Chinnery* v. *Blackburne*, 1 *H. Bl.* 117. (*n*).

6. A mortgagor ſhall never be permitted to diſpute the title of his mortgagee. *Per* Lord *Mansfield*, *Goodtitle* v. *Bailey*, 2 *Comyns*, 601.

7. If a road act (9 *G.* 3. *c.* 89.) require notice in writing to be given to mortgagees of lands wanted, in order to compel them to aſſign their intereſt, it is not ſufficient in an order of ſeſſions to ſay that *due notice* was given, but it ought to be ſtated to have been given in writing. *Rex* v. *Croke*, 1 *Comyns*, 30.

8. Such defective notice would not be cured by the appearance of the party. *Ibid.*

9. Ejectment will lie by a mortgagee againſt a *tenant* under a *leaſe* from the mortgagor ſubſequent to the mortgage without notice to quit. *Keech* v. *Hall*, 1 *Dougl.* 21. But if there is a tenant from year to year, and the landlord mortgages preceding the year, the tenant is entitled to ſix months *notice* to quit from the mortgagee. *Ibid.* 21. (*n*).

10. A tenant, under a *leaſe* from the mortgagor prior to the mortgage, ſhall not ſet it up againſt the mortgagee in ejectment, if he has *notice* that the mortgagee only means to compel him to attorn. *White* v. *Hawkins*, *Ibid.* 23. (*n*).

11. In the caſe of *Head* v. *Egerton* it was ſaid by the Lord Chancellor, "That in the defendant's pleading of a mortgage or purchaſe he ought to ſhew, that the vendor or mortgagor *being, or pretending to be, ſeiſed in fee* of the premiſes, did make ſuch conveyance or mortgage, *&c.*, otherwiſe the perſon undertaking to ſell or mortgage may be a mere ſtranger and have no intereſt in the premiſes, though he takes upon him to ſell or mortgage them." 3 *P. Wms.* 281.

12. In *ejectment* by a mortgagee, for the recovery of the poſſeſſion of the mortgaged premiſes, or in debt on bond conditioned for the payment of the mortgage money, or performance of covenants in the mortgage deed, where no ſuit in equity is depending for a foreclosure or redemption, it is enacted by the ſtat. 7 *G.* 2. *c.* 20. *ſ.* 1. that "if the perſon having a right to redeem ſhall at

any time pending the action, pay to the mortgagee, or in caſe of his refuſal, bring into court, all the principal monies and intereſt due on the mortgage, and alſo coſts to be computed by the court, or proper officer appointed for that purpoſe, the ſame ſhall be deemed and taken to be in full ſatisfaction and diſcharge of the mortage, and the court ſhall diſcharge the mortgagor of and from the ſame accordingly." Upon this ſtatute the proceedings in ejectment on a mortgage may be ſtayed by the mortgagor, or his aſſignee of the equity of redemption, on payment of the principal, intereſt, and coſts, without paying off a bond debt due to the mortgagee. *Archer* v. *Snatt*, 2 *Str.* 1107. *Andr.* 341. S. C.

13. And if there be any doubt as to the amount of what is due, the court will refer it to the Maſter who taxes the coſts, and if the debt and coſts are not paid, the plaintiff muſt proceed in the action, and cannot have an attachment. 2 *Stra.* 1220.

14. But the court will not ſtay proceedings in an ejectment brought by a mortgagee againſt a mortgagor on payment of the principal, intereſt, and coſts, if the latter has agreed to convey the equity of redemption to the mortgagee. *Goodtitle dem. Tayſum* v. *Pope*, 7 *Term Rep.* 185. But *vide Skinner* v. *Stacy*, 1 *Wilſ.* 80.

For more of *Mortgage* in general, ſee *Fraud*, *Incumbrances*, and other proper titles.

Mortmain.

(B) What is Mortmain.

15 Vin 482

1. DEVISE to charitable uſes under a will in 1734, the teſtator lived till *July* 1736, a month after the new ſtat. of mortmain took place, and then dies without revoking his will. It was referred by the court of Chancery to the judges for their opinion, whether this was a good diſpoſition to charitable uſes; and all of them, except Mr. Juſtice *Denton*, who was ill, certified that the deviſe to theſe uſes was good in law, notwithſtanding the act; and thereupon the Lord Chancellor declared the will ſhould be eſtabliſhed, and the truſts thereof carried into execution. 2 *Atk.* 36. 1740. *Aſhburnham* v. *Bradſhaw*, 1 *Veſ.* 33. *Attorney-General* v. *Lloyd*, S. P. 1 *Veſ.* 178. and 186. *Willet* v. *Sandford*, S. P. *Ambl.* 550. *Attorney-General* v. *Downing*.

2. The owner of land charged with an annuity for the payment of a ſchoolmaſter, will not be excuſed from the payment thereof on account of there being no ſchoolmaſter for ſix years. 2 *Atk.* 238. 1741. *Aylet* v. *Dodd*.

3. Though there are not persons in the parish sufficient to answer the description of a charity, yet the land charged with the payment is not discharged during that time. *Ibid.*

4. Two hundred pounds were given under the will of Mr. *Lane* to the ward of *Bread-street* according to Mr. ———'s will. Bill by the aldermen and principal inhabitants of the ward to have the directions of the court for the application of this charity, and the Attorney-General was made a defendant. And the money was decreed to be disposed of in such charities as the aldermen and inhabitants of the ward should think most beneficial. 2 *Atk.* 239. 1741. *Baylis and others* v. *Attorney-General.*

5. Sir *John Tash* devised copyhold lands in charity, that he had before surrendered to the use of his will, which consisted of eleven sheets, the two first of which he signed, and died before he signed the rest: there were no witnesses. Lord *Hardwicke* held it to be a good appointment of the *copyhold* estate for the charity, under the stat. 43 *Eliz.* 2 *Atk.* 497. 1742. *Attorney-General* v. *Sawtell.*

6. There must be a will duly executed to create a charitable use, and the court will not set up a trust for a charity without a declaration in writing; for in this case Lord *Hardwicke* held that charitable uses are within both the clauses of the *statute of frauds and perjuries*, as well within the clause of devises as the clause relating to the declaration of trusts; and notwithstanding there were circumstances, which shewed the inclination of the testator here, that some part of his estate should go to charitable uses, yet he did not think the evidence arising from thence certain enough to decree this to be a trust for charity, and that admitting parol evidence to prove it, would be breaking in upon the statute, the statute of mortmain not having abrogated the statute of frauds. 3 *Atk.* 141. 1744. *Adlington* v. *Cann and others.*

7. *W. B.* by will the 3d of *May* 1745, gave 500*l.* to *T. W.* and *J. B.* on trust to lay out 200*l.* in building a school-house, &c., and the remaining 300*l.* to be laid out in land *or some real security*, to be a maintenance for the master: the executrix refusing to pay the 500*l.*, an information in the name of the Attorney-General to have the trusts of the will, in respect to this charity, carried into execution. What the testator has directed to be done, with regard to the 300*l.*, is contrary to *the stat. of mortmain* 9 *Geo.* 2., and void; but the 200*l.* may be laid out in building a school-house on any lands in the village of *N.*, which lands already belong to some charity, but not in the purchase of lands. 3 *Atk.* 806. 1754. *Attorney-General* v. *Bowles*, 2 *Ves.* 547. S. C.

8. Devise before the *mortmain act* of lands in trust for a charity; a codicil after the act devising the same lands to the same trustees, and to two others to the same charity, making alterations in other parts of the will, confirming the rest, and declaring the codicil to be annexed, &c. to the will. The devise to the charity not void. 1 *Ves.* 178. and 186. 1748. *Willets* v. *Sandford, vide Ambl.* 451. *Attorney-General* v. *Heartwell*, S. P. *contra.*

9. *John*

9. *John Elbridge* being likely to die, made a conveyance of a real eſtate for the benefit of a charity: ten days afterwards he makes a will; by which he gives 3000*l.*, the exact value of that land, to the ſame charity, and 250*l.* to the ſame; and gives the eſtate to Mrs. *Elbridge*, wife of *Thomas Elbridge*, and to Mr. *Wolner* as tenants in common. After his death a bill is filed for an account, and for directions as to the ſettlement of *John Elbridge*'s eſtate under his will, and for a decree for that purpoſe. The court directed the Maſter to receive a ſcheme for carrying it into execution; the foundation of a part of which was to conſider in what way the money ſhould be laid out, and a perpetual fund created for the maintenance of the charity. The Maſter reported a ſcheme for laying out *the* 3000*l.* in the purchaſe of *theſe* lands; and the 250*l.* in other lands convenient for building the charity-ſchool. The report was confirmed, *Thomas Elbridge* and his wife who ſurvived him acquieſcing therein. After her death the information was filed on behalf of the charity, together with Mrs. *Hort*, adminiſtratrix of the perſonal eſtate of Mrs. *Elbridge*, to have the purchaſe carried into execution by the aid of the court, againſt the deviſee of the heir at law of Mrs. *Elbridge*, and againſt the infant ſon of Mr. *Wolner*, who was dead, having ſettled the eſtate on himſelf in tail. The court refuſed to decree the order made on the Maſter's report to be carried into execution. 1 *Veſ.* 218. 1748. *Attorney-General* v. *Day*.

10. A copyhold not ſurrendered to the uſe of the will deviſed to a charity held good, notwithſtanding the *ſtat. of frauds*, amounting to a direction to the heir to make a ſurrender: but it is alſo good by way of appointment by 43 *Eliz.*, under which a deviſe of lands in tail, though no recovery, is good. 1 *Veſ.* 225. 1748. *Attorney-General* v. *Andrews*.—Note, *this will was before the ſtat. of mortmain*.

11. Deviſe of money to be laid out in land for an annuity to a miniſter to preach an annual ſermon, and keep a tombſtone and inſcription thereon in repair, and to be a corporation for keeping account thereof, void by the ſtatute of mortmain. 1 *Veſ.* 320. 1749. *Durour* v. *Motteux*. *Ambl.* 643. 1767. *Gravenor* v. *Hallum*, *ibid.*

12. Mortgagee in poſſeſſion under a writ *habere facias poſſeſſionem* deviſes to a charity all money due by mortgage, this is within the *ſtat. of mortmain*, 9 *Geo.* 2.; and the information which was filed to carry the charity into execution was diſmiſſed. 2 *Veſ.* 45. 1750. *Attorney-General* v. *Meyrick*, 3 *Bro. Ch. Rep.* 373. *Attorney-General* v. *Earl of Winchelſea*, 4 *Veſ. jun.* 21. *White* v. *Evans*.

13. *Jane Churchill* deviſes her real eſtate to be ſold: the profits to be applied to the uſes of the will: directs her debts and legacies to be paid out of the perſonal eſtate; makes the truſtees executors; and leaves them all the reſidue of her perſonal eſtate and of that money, which ſhould ariſe by ſale of the real, to be given in what charities they ſhould think proper. This deviſe of the reſi-

due is void by the ſtat. of mortmain, and the court would not marſhal the aſſets to ſupport it. 2 *Veſ.* 52. 1750. *Mogg* v. *Hodges.*

Legacy to A. and B. who are appointed executors, and land deviſed to C., paying 1000*l. to the executors, the reſidue to a charity. This* 1000*l. is a charge on real eſtate, which, by the ſtatute of mortmain, is void, and reſults to the heir.* 1 Vez. 103. 1748. Arnold v. Chapman.

14. The reſidue of perſonal eſtate deviſed to build an hoſpital: this deviſe is not within the ſtatute of mortmain: but where the remainder over of real eſtate was given to a charity, the deviſe was within the ſtatute. 2 *Veſ.* 182. *Vaughan* v. *Farrer.*

15. Deviſe of lands to be ſold, and the reſidue of the money, after payment of debts, *&c.* to a charity, the deviſe is within the ſtat. of mortmain, and void. *Attorney-General* v. *Lord Weymouth*, *Ambl.* 20. 1743.

16. Deviſe of the reſidue of real and perſonal eſtate to a charity: it conſiſted, *inter alia*, of a leaſehold eſtate: void as to the leaſehold. *Ambl.* 155. 1752. *Attorney-General* v. *Graves*, *Ambl.* 216. 1754. *Attorney-General* v. *Tomkins.*

17. Legacy to eſtabliſh a *jeſuba* for inſtructing Jews in their religion. Queſtion, Whether the ſum given ſhould belong to the teſtator's next of kin, or was a charity to be diſpoſed of by the crown? And a diſtinction was taken by Lord *Hardwicke*, Chan., that when the deviſe is to a ſuperſtitious uſe, and made void by *ſtatute*, or to a charity, and made void by the *ſtat. of mortmain*, there it ſhould belong to the heir at law or next of kin: but where it is in itſelf a charity, but the mode in which it is to be diſpoſed of is ſuch, that by the law of *England* it cannot take effect, as in the preſent caſe, it promoting a religion contrary to the eſtabliſhed one, the crown by ſign manual directed to the Attorney-General may give orders as to the diſpoſal of it. *Ambl.* 228. *De Coſta* v. *De Pas.* 1754. *Attorney-General* v. *Herrick*, *Ambl.* 712. S. P.

18. Deviſe of money to a charity, with directions that it be laid out in the public funds till the whole can be laid out in the purchaſe of lands to the ſatisfaction of his truſtees, not within the ſtat. of mortmain. *Ambl.* 210. 1754. *Grimmett* v. *Grimmett*, *Soreſby* v. *Hollins*, and *Grayſon* v. *Atkinſon*, cited there.

19. *Chriſtopher Tancred*, by leaſe and releaſe 1ſt and 2d of *June* 1721, conveyed part of his real eſtates in default of iſſue of his body, to the uſe of the maſters of *Chriſt* and *Caius* College, the Preſident of the College of Phyſicians, the Treaſurer of *Lincoln's Inn*, the Maſter of the Charter-houſe, and the Governors of *Chelſea* and *Greenwich* Hoſpitals, and their ſucceſſors, in truſt, to pay yearly for ever the ſum of 50*l.* a-piece to twelve young perſons of 16 years of age, four of which were to be educated in the ſtudy of divinity at *Chriſt* College, four in phyſick at *Grenville and Caius College*, and four in the ſtudy of the common law in *Lincoln's-Inn*, to be paid to them until they ſhall have their reſpective degrees of Bachelor of Arts, Bachelor of Phyſick, and Barriſter at Law, and three years after ſuch degrees, and no longer;

longer; to be called *Tancred's* Students. He afterwards by will, 20th *May* 1746, gave other real eſtates to the ſame truſtees, to pay the profits in equal proportions to the ſaid 12 ſtudents, provided, that if the mortmain act ſhould prevent the diſpoſition of his land, and impede the premiſes deviſed to the ſaid 12 ſtudents, then, and not otherwiſe, he deviſed the premiſes not limited by the ſettlement to the 13 Fellows of *Chriſt*, and the Fellows of *Caius*, and the ſcholars of both colleges. The court was of opinion, that all the charities given by the deed were within the ſtat. 43 *Eliz.* With reſpect to the will, the court was of opinion that a deviſe to fellows and ſcholars of a college is within the exception in the ſtat. of *mortmain*, 9 *Geo.* 2., and good; and that the colleges are entitled to ſo much of the rents as was deſigned for the four ſtudents of *Lincoln's Inn*. *Ambl.* 351. 1757. *Attorney-General* v. *Tancred.*

20. Teſtator being poſſeſſed of a leaſe from the crown for years, of the right and power of laying chains in the river *Thames*, between *Bucby's hole* and *London-bridge*, for mooring of ſhips, and of all profits to ariſe therefrom, deviſed the ſame to charitable uſes. This is within the ſtat. of mortmain. *Ambl.* 367. 1758. *Negus* v. *Coulter.*

21. Rector of a pariſh bequeaths two ſums of money to be laid out in building a parſonage houſe, not within the ſtat. of mortmain. *Ambl.* 373. 1759. *Glubb and others* v. *Attorney-General and others.*

22. Legacy to the poor inhabitants of *St. Leonard's, Shoreditch*, good, and to go to the poor not receiving alms. *Ambl.* 422. 1762. *Attorney-General* v. *Clarke.*

Legacy to the poor, there were no words in the will to ſhew what poor the teſtator meant; but it appearing, that the teſtator was a French *refugee, the court directed the legacies to be paid to the poor refugees.* Attorney-General v. Mauce, July 1728. cited in the above caſe. *So where the bequeſt was for the benefit of poor diſſenting miniſters living in any county, it being in proof that there are three diſtinct ſocieties of diſſenters, and that collections are made for the poor miniſters in each, it was held to go to the poor miniſters of each ſociety.* Ambl. 524. 1765. *Waller v. Childs.*

23. Deviſe of lands to build and endow a college is good. *Ambl.* 550. 1766. *Attorney-General* v. *Downing.*

24. Deviſe of freehold and leaſehold premiſes to be ſold, and out of the money to buy land, and build an alms-houſe, *&c.* Void both as to the buying the land, and building an alms-houſe. *Ambl.* 614. 1763. *Attorney-General* v. *Tyndall*, 1 *Bro.* 444. S. C.

In caſe the particular charity directed could not take place, the teſtatrix directed the money to be laid out in ſuch charitable uſes as near to the teſtrix's intentions as could be, and the laws would permit—void. Ibid.

25. Bequeſt of the remainder of teſtator's effects, annuities, mortgages, *&c.* to a charity. The deviſe of the mortgages, though not in fee, is void, but being part of the enumerated reſidue, the court will order them to be firſt applied in payment of debts, before any other art of the perſonal eſtate, to leave a larger fund

for the charity, *Ambl.* 635. 1776. *Attorney-General* v. *Caldwell.*

26. *Richard Widmore*, by his will 30th *October* 1764, gave to the *Corporation of Queen* Ann's *Bounty* the ſum of 200*l.* to augment ſome poor vicarage in the counties of *Bucks* or *Southampton*. The court was of opinion that the legacy could not be ſupported, inaſmuch as it muſt of neceſſity, by the rules of the corporation, be laid out in land. *Ambl.* 636. 1766. *Widmore* v. *Woodroffe*, 1 *Bro.* 13. S. C.

27. Deviſe of lands to be ſold, and part of the money ariſing by ſale to go to *charitable uſes*, and the reſidue of the money was given over. So much of the money as was given in mortmain lapſes to the heir at law. Bequeſt of an annuity out of land to churchwardens to keep a vault in repair, is void at law, but the heir at law ſhall be ſubject to the truſt. *Ambl.* 643. 1767. *Gravenor* v. *Hallum.*

28. Legacy to be laid out in repairing a free chapel, is not within the ſtat. of mortmain. *Ambl.* 651. 1767. *Harris* v. *Barnes and others.*

Nor a legacy *to* repair *a parſonage-houſe*, 1 Bro. Ch. Rep. 444. Attorney-General *v.* Biſhop of Cheſter.—*Nor a legacy to build a parſonage-houſe, where no land is to be purchaſed.* Brodie *v.* Duke of Chandos, 1 Bro. 444 in notis. Attorney-General *v.* Biſhop of Oxford, ibid. *But money given to erect a ſchool-houſe*, where there is no land to erect it on, *is void.* Attorney-General *v.* Hutchinſon, ibid. Pelham *v.* Anderſon, ibid.—*Vide* Ambl. 373.

29. Bequeſt of 1000*l.* by ſale of lands to be applied in water-works for the uſe of the inhabitants of a town, is within the ſtat. of mortmain. *Ambl.* 651. 1767. *Jones* v. *Williams.*

30. Deviſe of money to the miniſter and churchwardens to erect a free ſchool in the pariſh, void. *Ambl.* 751. 1775. *Attorney-General* v. *Hyde and others.*

31. *Archibald Hutchinſon* bequeathed money upon mortgage to a charity in *Ireland*, his wife, who was executrix, by her will affirming that bequeſt; held to be an admiſſion of aſſets of the teſtator, and therefore good though out of land. 1 *Bro. Ch. Rep.* 271. 1783. *Campbell* v. *Earl of Radnor.* See *Attorney-General* v. *Meyrick*, 2 *Veſ.* 45.

32. Money bequeathed to be laid out in the purchaſe of heritable ſecurities in *Scotland* for a charity, not within the ſtat. of mortmain. 1 *Bro. Ch. Rep.* 571. 1784. *Attorney-General* v. *Hendrie.*

33. Deviſe of freehold houſes to eight poor perſons of a pariſh, the gift being void, a perſonal fund attached to the freehold is void alſo by the ſtat. of mortmain, and the court will not apply the gift to any other purpoſe. 2 *Bro. Ch. Rep.* 428. 1788. *Attorney-General* v. *Goulding.*

34. Deviſe of eſtates to truſtees for the uſe of *Univerſity College Oxford*, to buy advowſons; the college having as many as allowed by the ſtat. of mortmain, the deviſe ſhall be performed by exchange of advowſons or otherwiſe *cy près*; the heir at law being diſinherited

diſinherited where the gift is good at the time. 2 *Bro. Ch. Rep.* 492. 1789. *Attorney-General* v. *Univ. Coll. Oxon.*

35. Reſidue of perſonal eſtate given by teſtatrix to truſtees "to cauſe to be erected and built a dwelling-houſe to be appropriated to the uſe of a ſchool-houſe;" and her truſtees were directed to purchaſe land for that purpoſe, the truſtees purchaſed, and with their own money, which they offered to give to the charity: to a bill praying that the charity might be carried into effect, a demurrer on the ground that the charity legacies were void, was allowed. 3 *Bro. Ch. Rep.* 588. 1792. *Attorney-General* v. *Naſh.*

36. A bequeſt of money to be laid out in land to ſupport the preachers of two chapels, is a charitable uſe within *the ſtat. of mortmain*. *Grieves* v. *Caſe*. 1792. 4 *Bro. Ch. Rep.* 67. 1 *Veſ. jun.* 548. S. C.

37. Money to be inveſted *until an eligible purchaſe can be had*, is a deviſe of land, and void. *Ibid.*

38. Gift of part of the fund to *A.* and *B.* who where then the preachers, *with directions for their continuing to preach*, is part of the general plan, and therefore void. *Ibid.*

39. Bequeſt of real and perſonal eſtate to a truſtee to take a houſe for a ſchool to educate children and grandchildren of particular perſons, and other children, good as to the particular objects, but bad as a general charity. 4 *Bro. Ch. Rep.* 394. 1793. *Blandford* v. *Fackerell*, 2 *Veſ. jun.* 238. S. C.

40. *A.* before the ſtat. of *mortmain*, gave real and perſonal eſtate to a uſe, which would be within the ſtat., and to other uſes, which would not be affected by it. *B.*, after the ſtat., gave perſonal eſtate to the uſes of *A.*'s will; the eſtate of *A.* being ſufficient for the firſt uſe, the whole of the ſecond gift ſhall go to the valid uſe. 4 *Bro. Ch. Rep.* 412. 1793. *Attorney-General* v. *Hartley.*

41. Gift of perſonalty to eſtabliſh a ſchool, good notwithſtanding the *ſtat. of mortmain*. 4 *Bro. Ch. Rep.* 526. 1794. *Attorney-General* v. *Williams.*

42. Bequeſt to the ſociety for increaſing clergymen's livings in *England* and *Wales* for the perpetual purpoſe of increaſing their livings. The Governors of Queen *Anne*'s Bounty alone anſwer that deſcription; and as all their funds are laid out in land, the bequeſt is void by the *ſtat.* of mortmain. 3 *Veſ. jun.* 734. 1798. *Middleton* v. *Clitherow.*

43. Mortgage of turnpike tolls is within the ſtat. 9 *Geo.* 2. *c.* 36. 4 *Veſ. jun.* 430. 1798. *Knapp* v. *Williams*, *in notis.*

44. Legacy to the truſtees of a chapel for Proteſtant diſſenters, to be applied by them towards the diſcharge of the mortgage on the ſaid chapel, is void under the *mortmain act*. The mortgage having been paid off by other funds in the teſtator's lifetime, the court would not ſay, the legacy might not have been applied in repairing or ſuſtaining the chapel, but was of opinion it could not be

be applied to any other charitable purpoſe. 4 *Veſ. jun.* 418. 1799. *Corbyn* v. *French.*

45. Bequeſt of money to enable truſtees for a charity to complete a contract for the purchaſe of land, is void by the ſtat. of mortmain. *Per* Sir *Rd. Arden*, Maſter of the Rolls. *Ibid.* 431.

46. Specific diſpoſition by will in truſt to ſell, and in the firſt place to pay debts, legacies, and funeral charges, and charges of the probate, and execution of the truſt; and in the next place that the reſidue of the money be appropriated to the improvement of the city of *Bath*, is void by the *ſtat. of mortmain.* 4 *Veſ. jun.* 542. 1799. *Howſe* v. *Chapman.*

[G]

Motion.

(A) Motion in Court. What may be done upon Motion, &c.

25 Vin. 495.

The letter (*a*) is uſed to denote that the rule is *abſolute* in the firſt inſtance; the letter (*s*) that it is drawn up on the *ſignature* of counſel; the letter (*c*) that it cannot be had without *conſent*; and the letter (*n*) that in the firſt inſtance it is only a rule *niſi*.

1. MOTIONS are of a *civil* or *criminal* nature. Of the latter kind is a motion for an *attachment*, which may be moved for on account of contemptuous words ſpoken of the court (*a*) or its proceſs (*n*); for a reſcue (*n*), or diſobedience to a ſubpœna, or other proceſs (*n*); againſt a ſheriff for not returning the writ, or bringing in the body (*a*); againſt an attorney for not performing his undertaking or otherwiſe miſbehaving himſelf (*n*); againſt other perſons for non-payment of coſts on the Maſter's allocatur (*a*); for the non-payment of money generally (*n*), or not performing an award, &c. (*n*).—Motions of a civil nature are made on behalf of the plaintiff or of the defendant. On behalf of the plaintiff they are either 1ſt, for ſomething to be done in the common and ordinary courſe of the ſuit as to increaſe iſſues (*a*); for a *concilium* (*a s*) or judgment on demurrer, ſpecial verdict, or writ of error (*n*); for leave to enter up judgment on an old warrant of attorney (*a*), or *nunc pro tunc* (*n*); to enter up judgment and take out execution after an award, where a verdict has been taken for the plaintiff's ſecurity (*n*), or after a verdict for the plaintiff againſt one of ſeveral underwriters where the reſt have agreed to be bound by it (*n*), or to take out execution pending a writ of error (*n*), to amend the pleadings or other proceedings in the courſe of a ſuit (*n*), or to ſet aſide a judgment of *nonpros*, or of *nonſuit* (*n*), or a verdict or inquiſition (*n*). Or, 2dly, They are for ſomething to be done out of the common and ordinary courſe of the ſuit, as for the defendant to abide by his plea (*a s*), to refer it to the Maſter to aſſeſs the damages without a writ of inquiry (*n*); for the execution of a writ of inquiry before a judge (*n*), or to have a good

good jury upon the execution of ſuch a writ (*a*); for a trial at bar, or in an adjoining county (*n*); for a view in treſpaſs (*s*), in other caſes (*n*), or ſpecial jury (*s*); to have witneſſes examined on interrogatories (*c*); or for leave to inſpect and take copies of books, court rolls, &c. or to have them produced at the trial.—On behalf of the *defendant*.—Before declaration, they are to quaſh the writ (*n*), juſtify bail (*a*), reverſe an outlawry (*n*), or, after ſeveral rules for time to declare, that the plaintiff declare peremptorily (*a*).—*After declaration*, they are to ſet aſide an interlocutory judgment for irregularity, as being ſigned contrary to good faith, or upon an affidavit of merits (*n*), to ſet aſide or ſtay proceedings in actions upon bail bonds, or in other actions if irregular or unfounded (*n*), and if the defendant is a priſoner to diſcharge him out of cuſtody upon common bail (*n*); or if the proceedings are irregular to ſtay them upon terms (*n*), to compound penal actions (*c*), change the venue (*a*), conſolidate actions (*n*), or ſtike out ſuperfluous counts (*n*), for time to plead or reply, &c. under ſpecial circumſtances (*n*); to plead ſeveral matters, or pay money into court (*s*), to withdraw the general iſſue and plead it *de novo*, with a notice of ſet-off; or upon paying money into court, to add or withdraw ſpecial pleas, all theſe are generally (*a*) but ſometimes (*n*); to pay the iſſue money into court in a *qui tam* action (*n*); to put off a trial if the defendant is not ready (*n*), or if the plaintiff will not proceed to trial (*a*), or inquiry (*a*), or for judgment as in caſe of a nonſuit (*n*); in arreſt of judgment (*n*); or for a ſuggeſtion after verdict to entitle the defendant to coſts (*n*); to ſet aſide an execution and diſcharge the defendant or reſtore to him the money levied, or retain it in the ſheriff's hands (*n*). 1 *Tidd's Pract. K. B.* 401.

2. There are ſome motions peculiar to the action of *ejectment*, ſuch as for judgment againſt the caſual ejector generally (*s*), but where there is any thing peculiar in the ſervice of the declaration, it ſhould be mentioned to the court, and where the affidavit of ſervice is defective, they will give leave to file a ſupplemental one;—that ſervice on the tenant's ſon, daughter, &c. may be deemed good ſervice (*n*) for the landlord to be admitted defendant inſtead of the tenant (*s*), or for leave to take out execution in ſuch caſe againſt the caſual ejector, after the landlord has failed in his defence. 1 *Tidd's Prac. K. B.* 410.

3. There are alſo other motions not neceſſarily connected with any action, as to ſet aſide an annuity, and deliver up the ſecurities to be cancelled, &c. (*n*). *Ibid.*

4. By the annuity act, 17 *G.* 3. *c.* 26. *ſ.* 4., the court in which any action is brought for payment of the annuity or judgment entered, have in certain caſes an *expreſs* juriſdiction given them by motion, to ſtay proceedings on the judgment or action, and to order the ſecurity to be cancelled, and the judgment, if any has been entered up, to be vacated. And in other caſes, not ſpecially provided for by the above clauſe, when a warrant of attorney has been given to confeſs a judgment, or judgment has been entered

up,

up, for ſecuring the payment of an annuity, the court, in virtue of their *general* juriſdiction, will enter into the validity of the warrant of attorney or judgment upon motion; and, if the proviſions of the act have not been complied with, will vacate the warrant of attorney, or ſet aſide the judgment. *Ex parte Cheſter*, 4 *Term Rep.* 695. *Haynes* v. *Hare*, 1 *H. Bl.* 659.

5. The court will not upon motion make an order, which will decide the merits of the cauſe. 1 *Bro. Ch. Rep.* 366. *Pike* v. *Beresford*.

6. The variety of ſhapes in which motions are made in the court of Chancery to obtain relief, according to the peculiar circumſtances of each caſe, renders it impoſſible to ſtate every poſſible form in which a notice of motion may be given; the forms of notices in 2 *Harr. Ch. Prac.* 132. in ordinary caſes may be ſo far deſcriptive of the general outlines of a notice of motion as to give an idea to the young practitioner of the form in which ſuch notices are generally conceived. *Wyatt's Prac. Reg.* 289.

25 Vin. 497. **(C) Time. At what Time a Motion may be made, for what.**

1. ATTACHMENT cannot be moved for on the laſt day of term, except for non-payment of coſts, or againſt the ſheriff for not returning a writ. 1 *Burr.* 651.

2. Counſel may move on the laſt day of term to *quaſh* an indictment, but *not* to quaſh *an order*. *Ibid.*

3. The Maſter's report upon interrogatories of contempt cannot be moved for on the laſt day of term without previous leave of the court, except in extraordinary caſes, and upon perſonal ſervice of the notice. 1 *Black. Rep.* 311.

4. A motion to anſwer the matters of an affidavit cannot be made on the laſt day of term. *Jacob's* caſe, 4 *Burr.* 2502.

5. Nor any motion which would operate as a ſtay of proceedings, unleſs it apppear to the court that under the circumſtances it could not have been made earlier. *Leader* v. *Harris*, *M.* 37 *G.* 3.

6. The court will not on the laſt day of term hear a motion for a rule *niſi* to ſet aſide an award. *Nettleton* v. *Croſby*, *H.* 38 *G.* 3. Nor can counſel be heard on that day to ſhew cauſe againſt ſuch a rule, but the ſame muſt be enlarged and made peremptory for the next enſuing term. *R. M.* 36 *G.* 3.

7. A rule *niſi* for a criminal information may be granted at the end of a term againſt a magiſtrate for mal-practices during the term, but not for any miſconduct before the term. *The King* v. *Carpenter Smith*, 7 *Term Rep.* 80.

(D) Quaſhed on Motion. What.

15 Vin. 498.

1. THE court may uſe a diſcretion, either to quaſh an indictment on motion for inſufficiency, or put the defendant to demur to it; but after verdict they are bound to arreſt the judgment, if they ſee the charge to be inſufficient. 2 *Burr.* 1127.

2. But the reaſon of not quaſhing on motion, but leaving the party to demur, does not hold where the objection is to the juriſdiction of the court that has undertaken to proceed. 1 *Burr.* 389.

3. The court will not quaſh an indictment on motion of the proſecutor, unleſs on the ground of inſufficiency. *Rex* v. *Stratton*, 1 *Dougl.* 239.

4. Motion for the proſecutor to quaſh his own indictment is not of courſe, eſpecially if the defendant has been put to expence. *Rex* v. *Webb*, 3 *Burr.* 1468.

(E) What muſt be done, or will be required in order to obtain what is moved for.

15 Vin. 498.

1. A Motion is generally accompanied with an affidavit, and ſometimes preceded by a notice. The affidavit ſhould be properly entitled, and contain a full ſtatement of all the circumſtances neceſſary to ſupport the application, and the rather as it is a rule not to receive any ſupplemental affidavit on ſhewing cauſe. 2 *Term Rep.* 644.

2. Motions and affidavits for attachments on civil ſuits are proceedings on the civil ſide of the court until the attachments iſſue, and are to be entitled with the names of the parties. But as ſoon as the attachments iſſue, the proceedings are on the crown ſide, and from that time the king is to be named as the proſecutor. *Wood* v. *Webb*, 3 *Term Rep.* 253. *Rex* v. *Sheriff of Middleſex*, 7 *Term Rep.* 439.

3. Where a ſubmiſſion to an award is made a rule of court under the ſtatute, there being no action, the affidavits on which to apply for an attachment for diſobeying the award need not be entitled in any cauſe, but the affidavit in anſwer muſt. *Bevan* v. *Bevan*, 3 *Term Rep.* 601.

4. The rule to ſhew cauſe is drawn up for a particular day in term, previous to which it ſhould be duly ſerved. To bring a party into contempt, a copy of the rule muſt be perſonally ſerved, and the original at the ſame time ſhewed to him; in other caſes, the ſame degree of ſtrictneſs is not required in the ſervice of the rule, but it is ſufficient, without ſhewing the original, to leave a copy of it with any perſon repreſenting the party at his dwelling-houſe or place of abode. *The King* v. *Smithies*, 3 *Term Rep.* 351.

5. Before cauſe ſhewn an office copy muſt be taken of the rule and of the affidavit upon which it was granted, otherwiſe

counſel

counſel cannot be heard. Previous to ſhewing cauſe, it is uſual to deliver over the affidavit againſt the rule to the counſel for the rule, who has a right to make any objection appearing on the face of it, and if a doubt ariſes, upon the ſtatement of the facts contained in the affidavit, it is inſpected by the judges, or read by the officer of the court; when an affidavit has been made uſe of, but not before, it may be filed, in order that, if it be not true, the party may be indicted for perjury. *Tidd's Prac. K. B.*

15 Vin. 499. (G) Notice. In what Caſes it muſt be given, and at what Time.

1. EVERY notice of motion muſt be given two days at leaſt before the day on which it is moved; if the motion is to be on *Thurſday*, the notice muſt at leaſt be on *Tueſday*; if on *Monday*, the notice muſt be on *Friday*, *Sunday* being no day. *Maxwell* v. *Phillips*, *June* 22*d*, 1801.

2. Notice of motion, given by one not allowed to act as a ſolicitor, is not good. 3 *P. Wms.* 103. *Ex parte Sir Richard Groſvenor.*

3. Notice of motion, though ſeldom neceſſary, is frequently given in order to ſave time and expence, by affording the adverſe party an opportunity of ſhewing cauſe in the firſt inſtance, or by inducing the court to diſallow the coſts of proceedings taken after the notice, and before the motion.

4. The ſtat. 14 *G.* 2. *c.* 17. requires notice of motion for judgment as in caſe of a nonſuit; but in the court of *K. B.* the rule to ſhew cauſe is deemed a ſufficient notice. *Loffi*, 65.

5. But it is otherwiſe in the *Common Pleas*. *Gooch* v. *Pearſon*, 1 *H. Bl.* 527.

[G] # Murder or Manſlaughter.

15 Vin. 503. (C) By what Perſons it may be.

A Child of ten years of age may be guilty of murder. *York's* caſe. 1748. *Foſter*, 70.

(D) Of Officers, and Pleadings.

15 Vin. 504.

1. QUÆRE. Whether a woman, who in a tranſport of paſſion, kills a peace-officer, who is about to take the man ſhe cohabits with to priſon, under a warrant which turns out to be illegal, is guilty of murder or manſlaughter. *Mary Adey*'s caſe, *Leach's Cr. Caſ.* 245.

2. To kill a bailiff in the execution of an *attachment* iſſued by the *county clerk* in a cauſe in which *he* is plaintiff, is murder, for ſuch attachment is legal. *Baker*'s caſe, *Ibid.* 131.

3. So killing an officer, while he is endeavouring to arreſt a man upon a *blank warrant*, is murder. *Ibid.* 133. *notis.*

4. Peace-officers, having a *legal* warrant to arreſt for a breach of the peace, may break open doors, after having given due notice and demanded admittance. *Foſter*, 136. But they cannot juſtify breaking open outward doors or windows to execute a civil ſuit. *Foſter*, 319, 320. *Cowp.* 3. Therefore, where a man, who had been arreſted by the artful contrivance of an officer upon civil proceſs (that of the warrant having been filled up after it had been ſealed), obliged the officer to decamp by ſnapping a piſtol at him three times; but the officer returning to the houſe, accompanied by the plaintiff and the attorney, and all three attempting to force in, the man within fired a gun through the door and ſhot the attorney; it was ruled manſlaughter only. 10 *State Trials*, 462. *Foſt.* 311, 312.

5. If a ſtranger ſeeing a perſon arreſted and reſtrained from his liberty, under colour of a preſs-warrant or civil proceſs, *&c.* by thoſe who in truth have no ſuch authority, happen to kill ſuch treſpaſſer in reſcuing the perſon oppreſſed, he ſhall be adjudged guilty of manſlaughter only. *Tooley*'s caſe, *Lord Raym.* 1296. But the principles upon which this caſe was decided are very ſtrongly controverted by Mr. Juſtice Foſter, p. 315 to 318.

6. It is ſufficient that the proceſs is not defective in the frame, and that it iſſue in the ordinary courſe, though there was error in the proceedings before: and if the warrant is produced at the trial, the judgment, or decree need not. *Per Hardwicke*, C. J. *Roger*'s caſe. 1735.

7. If the proceſs is defective in the frame, if there is a miſtake in the name or addition of the perſon on whom it is to be executed, or if his name, or the name of the officer be inſerted without authority, and after iſſuing the proceſs, or the officer exceeds his authority and is killed, it is only manſlaughter in the perſon whoſe liberty is invaded. *Foſter*, 312.

8. If a gaoler carry his priſoner, againſt his will, who he knows has never had the ſmall-pox, but fears it, to a place where he knows a perſon having it is, and the priſoner catches it, and dies, it is murder. *Vide Cartle* v. *Bambridge*, *Stra.* 854.

9. If

9. If a gaoler (as warden of the *Fleet*) has a lawful deputy, whoſe ſervant by *dureſs* (of confining in an unwholeſome room) kills his priſoner, it is not murder in the principal, though he ſometimes acted as warden, and once ſaw the deceaſed in the unwholeſome room. *Rex* v. *Huggins*, *Stra.* 882. *Ld. Raym.* 1574.

10. But it is murder in the ſervant. *Ibid.*

11. Perſons having authority to arreſt or impriſon, uſing the proper means for that purpoſe, and being killed in the ſtruggle, it is murder in all who take part in ſuch reſiſtance. And this will hold in all caſes, whether civil or criminal. *Foſter*, 270. So in caſe of breach of the peace, or any miſdemeanor ſhort of felony. *Ibid.*

15 Vin. 506. (E) How. By Malice aforethought, and what ſhall be ſaid ſuch.

1. *MALICE aforethought* is, when the fact is attended with ſuch circumſtances as are the ordinary ſymptoms of a wicked, depraved, malignant ſpirit; or an action flowing from a wicked and corrupt motive, a thing done *malo animo*, *mala conſcientia*. *Foſter*, *C. L.* 256.

2. If *A.* and *B.* have a ſudden quarrel, and blows paſs, and there appears a ſufficient time for the parties to have cooled, and afterwards *A.* kills *B.*, it is murder. *Rex* v. *Oneby*, 2 *Stra.* 765.

3. It is the province of the judge, from the circumſtances of the caſe, to determine what is malice, and whether the killer had a ſufficient time to cool. *Ibid.*

4. If *A.* ſay he will avenge himſelf of *B.*, or that he will have his blood, this is expreſs malice againſt *B.*, and if a killing enſue it is murder. 2 *Stra.* 765. 2 *Ld. Raym.* 1485.

5. If *A.* and *B.* play, then wreſtle, then cudgel. *A.* gives *B.* a ſmart ſtroke, *B.* grows angry, throws away his cudgel, and they fight in earneſt, but are parted; *A.* goes away angry, and threatens to fetch ſomething and ſtick *B.*; he changes his cloaths, returns with a ſword concealed and a cudgel in his hand, draws on a diſcourſe of the quarrel, and offers to cudgel if *B.* will keep off his hands; *A.* drops the cudgel, which *B.* takes up, and gives *A.* two blows on the ſhoulders; *A.* draws out the concealed ſword, ſays, "ſtand off, or I'll ſtab you;" thruſts at, but miſſes him; *B.* goes back; *A.* ſhortens his ſword, leaps towards *B.*, ſtabs him, and he dies. It is murder. *Maſon*'s caſe. 1756. *Foſter*, 132.

6. So in the caſe of a ſudden affray, where no felony is committed nor wound given, if a perſon interpoſing to part the combatants, giving notice to them of his friendly intention, ſhould be killed by either of the combatants, it would be murder in the perſon ſo killing. *Foſter*, 270.

7. Whenever it appears that a man killed another, it ſhall be intended *primâ facie* that he did it maliciouſly, unleſs he can make out

out the contrary, by ſhewing that he did it by ſudden provocation. 1 *Hawk. P. C.* 190.

8. *A.* and *B.* ſuddenly quarrel; upon ſome provoking language *B.* ſeizes *A.* by the collar; a fight enſues; they both fall to the ground; and while ſtruggling on the ground *B.* receives a mortal wound from a knife which *A.* held in his hand. This adjudged *manſlaughter* only. *Snow's* caſe, *Ca. in C. Law*, 180.

9. A mother-in-law, on perceiving a fault committed by her daughter-in-law in ſome work ſhe was doing, throws a child's ſtool at her and kills her, and then conceals her death, and hides the body. *Quære*, Whether it is murder or manſlaughter? *Hazel's* caſe, *Ca. in C. Law*, 406.

(F) How. By Intention to do a leſs Miſchief only. 15 Vin. 508.

1. WHEREVER a perſon, in cool blood, by way of revenge, unlawfully and deliberately beats another in ſuch a manner that he afterwards dies thereof, he is guilty of murder, however unwilling he might have been to have gone ſo far. 1 *Hawk. P. C.* 194. 2 *Stra.* 771.

2. If a gaoler confine his priſoner againſt his will in an unwholeſome room without allowing him the neceſſaries of a chamber pot, *&c.* whereby he contracts a diſtemper by which he dies, this is murder by dureſs in the party doing it. *Rex* v. *Huggins*, 2 *Stra.* 882. If the verdict be, that the principal gaoler knew the condition of the room, and that within 15 days of the death he was preſent, with his deputy, and "ſaw the deceaſed under the "dureſs of the ſaid impriſonment," ſufficient facts are not found to amount to murder. *Ibid.*

(G) How. Without Intention, but in *doing an unlawful Act*, or an Act not warranted by Law. 15 Vin. 508.

1. TO render the killing murder in all thoſe who aſſembled to do an unlawful act, it muſt appear that it was committed in proſecution of ſome unlawful purpoſe: thus, ſmugglers aſſemble to run wool, officers oppoſe, a ſmuggler fires a gun, and kills another ſmuggler: if it does not appear it was levelled at the officers, the other ſmugglers preſent are not guilty, for it does not appear it was in proſecution of the purpoſe for which they aſſembled. *Plummer's* caſe, *Foſter*, 352.

2. Three ſoldiers go to rob an orchard, two get up the tree, the third ſtands at the gate with a drawn ſword, the owner's ſon comes and ſeizes him, he ſtabs him: thoſe in the tree not guilty; otherwiſe had they come with a general reſolution againſt all oppoſers. *Per Holt*, *Foſter*, 353.

3. If one ride among a multitude with an horſe uſed to kicking, and death enſues, it is murder. *N. P. C.* 44.

4. If a man, duped, and encouraged by a concourſe of people, throw a pick-pocket into a pond adjoining the road, to revenge the theft by ducking him, but without any apparent intention to take away his life, and the pick-pocket be drowned, it is manſlaughter only. *Old Bailey.* 1785. 1 *Hawk. P. C.* 193.

5. The defendant came to town in a chaiſe, and before he got out of it, he fired his piſtol, which by accident killed a woman; and *King*, C. J. of *C. B.* ruled it to be but manſlaughter. *Rex* v. *Burton*, 1 *Stra.* 481.

6. If *A.* carry his priſoner *B.* againſt his will to a houſe where he knows the ſmall-pox is, and that *B.* has not had it, or detains him when he deſires to be removed, and *B.* catch it and die thereby, it is murder in *A.* *Caſtell* v. *Bambridge et Corbett*, 2 *Stra.* 853.

7. Accidental homicide may be murder, if it happen in the proſecution of an illegal act. *Hodgſon's* caſe, *Ca. Cr. Law*, 7.

15 Vin. 509. (I) How. By or of one interpoſing, where two are fighting or quarrelling.

IF a ſtranger interpoſe to part combatants in an affray, giving notice to them of that intention, and they aſſault him, and in the ſtruggle he ſhould chance to kill, this would be *juſtifiable homicide*; for it is every man's duty to interpoſe for the preſervation of the public peace, and the prevention of miſchief. *Foſter*, 272.

15 Vin. 512. (N) How. By *Quarrels and Provocations*, and what ſhall be ſaid ſuch.

1. WHERE three *Scotch* ſoldiers were drinking together in a public houſe, and one of them ſtruck ſome ſtrangers, who were drinking in another box, with a ſmall rattan for having uſed ſeveral opprobrious epithets and reviled the character of the *Scotch* nation, and an altercation enſued; and one of the ſtrangers laid hold of the ſoldier who had ſtricken, and threw him againſt a ſettle; and when the ſoldier had paid the reckoning, the ſtranger again ſhoved him from the room into the paſſage, upon which the ſoldier exclaimed that "he did not mind killing an *Engliſhman* "more than eating a meſs of crowdy," upon which the ſtranger, aſſiſted by another perſon, violently puſhed the ſoldier out of the houſe, whereupon the ſoldier inſtantly turned round, drew his ſword, and ſtabbed the ſtranger to the heart: this was adjudged manſlaughter. *Rex* v. *Taylor*, 5 *Burr.* 2793.

Vide the caſe of Rex v. John Brown, for the murder of J. Maccaſter, June 1776. Caſes in C. L. 176. And the caſe of the King v. Snow, tried before Willes, J. Sum. Aſſ. Northampton, 1786. Caſes in C. L. 180.

2. In every caſe of homicide upon provocation, how great ſoever it be, if there is a ſufficient time for paſſion to ſubſide, and for

for reaſon to interpoſe, ſuch homicide will be murder. 1 *Hawk. P. C.* 194. *Foſter*, 278. 296.

3. Two bailiffs, who killed a priſoner (Mr. *Luttrel*) in his own houſe, by giving him nine wounds with a ſword, and ſhooting him with a piſtol when he was fallen on the ground, found guilty of manſlaughter only, becauſe it appeared that he had given one of them a blow with his caſe. He had a ſword which was drawn and broken; but how, did not appear. He had brought the piſtols into the room, and declared he would not be forced out of his lodgings. He threatened the officers. Both the officers were ſlightly wounded. *Rex* v. *Reaſon and Tranter.* 1 *Stra.* 499. *Foſt.* 292.

4. If the captain of a ſhip has a preſs-warrant, directing *that no perſon but a commiſſion-officer is to be entruſted with the execution of it*, and his name to be inſerted on the back of it; and he accordingly appoints his lieutenant, *who ſtays in the ſhip*, and the captain ſends his boat with ſome of the crew to preſs, and ſome leagues off they board a ſhip, and attempt to preſs, and one of them is killed, it is manſlaughter, for they did not act according to the warrant. *Broadfoot*'s caſe, 1743. *Foſter*, 154.

(O) How. By *one* in a Company, where *it is Murder in another.* 15 Vin. 516.

1. ON an indictment for murder, if the jury find a ſpecial verdict, it is neceſſary, in order to affect principals in the ſecond degree, to ſtate. 1ſt, That they were actually preſent; or 2dly, Some acts done by them at the very time, which unavoidably ſhew that they were preſent; 3dly, That they were of the ſame party, on the ſame purſuit, and under the ſame engagements and expectation of mutual defence and ſupport with the perſon who did the fact. *Rex* v. *Borthwick and others*, 1 *Dougl.* 207.

2. Perſons preſent, aiding and abetting, are principals in the ſecond degree, and are within the riot act and ouſted of clergy. *Rex* v. *Boyce*, 4 *Burr.* 2073.

3. *Rex* v. *Hodgſon and others.* This was a ſpecial verdict upon an indictment for *murder*, found at the ſeſſions houſe in the *Old Bailey*, to the following effect.—The priſoners, together with ſeveral others, were hired by one *J. S.* to aſſiſt him in carrying away his houſehold furniture, in order to avoid its being diſtrained for rent. They accordingly aſſembled for this purpoſe, armed with bludgeons and other offenſive weapons. The landlord of the houſe, accompanied on his part by another ſet of men, came to prevent the removal of the goods, and a violent affray enſued. The conſtable was called in, and he produced his authority, but could not induce them to diſperſe. While they were fighting in the ſtreet, one of the company, to the jurors unknown, killed a boy who was ſtanding at his father's door looking on, but totally

unconcerned in the affray. The queſtion was, Whether this was murder in all the company? This was ſubmitted to the conſideration of all the judges in the ſhape of *a reſerved caſe*. They accordingly met, and the two chief juſtices were of opinion, that it was murder in all the company, becauſe they were all engaged in an unlawful act, by proceeding in the affray after the conſtable had interpoſed, and commanded them to keep the peace, eſpecially as the manner in which they originally aſſembled, *viz.* with offenſive weapons and in a riotous manner, was contrary to law, though the purpoſe for which they aſſembled, *viz.* to carry away the goods, was juſtifiable. But the majority of the judges held that as the boy was found to be unconcerned in the affray, his having been killed by one of the company could not poſſibly affect the reſt; for the homicide did not happen in proſecution of the illegal act, and therefore the perſons, though conſtructively preſent, could not be ſaid to be aiding and abetting the death of one who was totally unconcerned in the deſign for which the parties had aſſembled. *Caſes in Cr. Law*, 7.

4. There are no principals in the ſecond degree in privately ſtealing from the perſon. *Rex* v. *Innis*, *Ibid.* 8.

5. If two perſons be indicted for murder, the one as a principal in the firſt degree, and the other as being preſent aiding and aſſiſting to commit the crime, the jury may find the principal in the firſt degree *not guilty*, and convict the principal *in the ſecond degree*.

6. Perſons preſent aiding and aſſiſting *in ſhooting at another*, though uſing no fire arms themſelves, are principals, and within the penalties of the *Black Act*. *The Coalheavers'* caſe, *Ca. C. L.* 76.

15 Vin. 519. ## (P) Juſtifiable. In what Caſes, and Pleadings.

1. NO doubt the forcibly attempting the commiſſion of an unnatural crime may be reſiſted by the death of the aggreſſor. 4 *Bl. Comm.* 181.

2. If a ſtranger interpoſe to part combatants in an affray, giving notice to them of that intention, and they aſſault him, and in the ſtruggle he ſhould chance to kill, this would be *juſtifiable homicide*; for it is every man's duty to interpoſe for the preſervation of the public peace, and the prevention of miſchief. *Foſter*, 272.

15 Vin. 520. ## (Q) Juſtifiable. By Officers or Perſons having Warrants.

1. WHERE a ſheriff, *&c.* attempting to make a lawful arreſt *in a civil action*, or to retake one who has been arreſted and made his eſcape, *is reſiſted* by the party, and *unavoidably* kills him in the affray, it is juſtifiable homicide. *Foſter*, 270. 4 *Comm.* 180.

2. And in ſuch caſe the officer is not bound to give back, but may ſtand his ground, and attack the party. *Foſt.* 292. 1 *Stra.* 499.

3. But no private perſon of his own authority can arreſt a man for a *civil* matter, as he may for *felony*, &c. Neither can the ſheriff himſelf lawfully kill thoſe who *barely fly from* the execution of any *civil* proceſs. *Foſter*, 271.

(R) Excuſable. 15 Vin. 520.

IF an officer of the impreſs ſervice fire in *the uſual manner*, at the *hallyards* of a boat, in order *to bring her to*, and kill a man, it is only manſlaughter. *L. Mansfield*, 2 *Comp.* 832.

(W) Indictment. Good or not. 15 Vin. 522.

1. IN an indictment for murder it is perhaps a fatal miſtake not to ſhew the day and place of *the ſtroke* as well as of *the aſſault*, becauſe theſe offences are of different kinds, the one being only a treſpaſs, and the other a felony, and may well be intended to have happened at different times and places, and the giving of the ſtroke being the principal offence, ought to be ſet forth with the moſt exact certainty.

2. If a mortal wound be given upon which the party dies at another day, the death ought to be alleged at the laſt day. 4 *Com. Dig.* 377.

3. An indictment for murder muſt ſtate that the priſoner gave the deceaſed a *mortal* wound. *Lad's* caſe, *Caſes in C. Law*, 112.

Mute. [G]

(A) Puniſhment thereof by *peine fort et dure*, or *otherwiſe*, in what Caſes by the common Law, or by Stat. *Weſtm.* 13 *E. c.* 12. 15 Vin. 527.

1. BY ſtat. 12 *G.* 3. *c.* 20. it is enacted, That if any perſon, being arraigned on any indictment or appeal for felony or piracy, ſhall, upon ſuch arraignment, ſtand mute, ſuch perſon ſhall be convicted of the felony or piracy charged in the indictment, and the court ſhall award judgment and execution againſt ſuch perſon in the ſame manner as if he had been convicted by verdict or confeſſion, and ſuch judgment ſhall have all the conſequences

in every reſpect as if ſuch perſon had been convicted by verdict or confeſſion, and judgment thereupon awarded.

2. *Old Bailey* ſeſſion 1778. *Francis Mercier*, on his arraignment for murder, ſtood mute. The ſheriff was directed to return a jury *inſtanter* to inquire whether it was "through obſtinacy, or "the viſitation of God."—The jury found that he ſtood mute "fraudulently, wilfully, and obſtinately, and not by the provi-"dence of God."—The judge immediately paſſed ſentence, and he was executed. *Caſes in Crown Law*, 218.

I do not find it ſaid in any book (ſays Serj. *Hawkins*) what ſhall be done to a priſoner, who obſtinately ſtanding mute to an arraignment, ſhall appear to be charged upon very light ſuſpicion; but I take it for granted, that he may be ſeverely fined and impriſoned for the contempt. 4 *Pleas of the Cr.* 234.

Ne exeat Regno.

15 Vin. 437. (B) *Neceſſary* and grantable, in what Caſes and how.

1. UPON a motion for a *ne exeat regno*, it was ſaid by Lord Chancellor, that this was originally confined to ſtate affairs, and the intent of it was to prevent any perſon from going beyond ſea, to tranſact any thing to the prejudice of the king or his government, but that now it was very properly uſed in civil caſes, but that to induce the court to continue it to the hearing the plaintiff muſt ſhew that the debt is certain; but in this caſe there was nothing more than a demand by a wife againſt her huſband, by virtue of a marriage agreement, in which the defendant obliged himſelf to ſecure 1700*l.* out of his eſtate, real and perſonal, to his wife, as a proviſion in caſe ſhe ſurvived him; but this is a contingency which may never happen. Motion denied. 1 *Atk.* 521, 1738. *Anon.*

2. On motion to prevent a defendant going out of the kingdom till he had put in his anſwer, the court ordered him to give ſecurity to abide by the decree which ſhould be made upon the hearing. 2 *Atk.* 66. 1740. *Baker* v. *Dumareſque.*

3. No inſtance of a *ne exeat* being granted where it is not a mere equitable demand, except where a wife ſued in the ſpiritual court for alimony, and the huſband threatened to leave the kingdom, and to aid that court, and out of compaſſion to her, it was granted. 2 *Atk.* 210. 1741. *Anon.*

4. Motion for a *ne exeat regno*, againſt the wife of *Glaſs*, who was executrix of her former huſband. *Glaſs* was already gone out of the kingdom, and it was doubted by the Lord Chancellor whether it could be granted, as ſhe was a *feme covert*, and could

give

give no ſecurity, but the motion was afterwards granted. 3 *Atk.* 409. 1746. *Jerningham* v. *Glaſs.* *Ambl.* 62. S. C.

5. A *ne exeat regno* cannot be granted unleſs the plaintiff ſwears poſitively that the defendant is indebted to him in a certain ſum. 3 *Atk.* 501. 1747. *Mico* v. *Gualtier.*

6. An affidavit to found a writ of *ne exeat regno*, muſt not only ſay, that the defendant is indebted in ſuch a ſum, but muſt alſo mention the facts on which it ariſes and on which it is grounded; and in this caſe the bill being againſt an adminiſtrator, the affidavit ought to ſtate, *as to knowledge or belief*, that aſſets had come to his hands; becauſe the demand ariſes *in auter droit*, otherwiſe it would be holding one to bail who could not be held to bail at law; and would detain a perſon here whom they had no right to detain, the demand ariſing *in auter droit.* 2 *Veſ.* 490. 1752. *Anon.*

7. The court will not grant a *ne exeat regno* where the perſon lives out of the kingdom, and the tranſaction was on the faith of having juſtice done where he reſided. *Ambl.* 177. 1753. *Robertſon* v. *Wilkie.*

8. Motion for a *ne exeat regno*, the caſe appeared to be, that the contract was made in *Carolina*, that a bond was given, and was afterwards ſatisfied by a payment in paper money, at the value which it then legally *bore* in that ſtate. The ſtate of *Carolina* afterwards paſſed an ordinance, which made paper of that kind not a *legal tender* in tranſactions *not complete.* The parties being now here, the plaintiff applied for this writ, contending that he had an equity here from the nature of the payment there. Lord Chancellor refuſed the writ, as no equity could ariſe here from a tranſaction *legally* ſatisfied in the country where it aroſe; and ſaid a writ of *ne exeat* never could be granted, but upon a *clear* demand. 1 *Bro. Ch. Rep.* 376. 1784. *Anon.*

9. Bill by infants againſt the adminiſtratrix of an inteſtate's eſtate, (who had married again, and her ſecond huſband, for diſtributive ſhares.) An application had been made for a *ne exeat regno* againſt the huſband of the adminiſtratrix on the affidavit of the wife, that he had poſſeſſed the perſonal eſtate of the inteſtate, and was going abroad; but the motion was refuſed as the court would not receive the affidavit of the wife againſt the huſband. 3 *Bro. Ch. Rep.* 11. 1789. *Sedgwick* v. *Watkins.* 1 *Veſ. jun.* 49. S. C.

10. A bond had been given by the defendant to *Saunderſon*, and by him aſſigned to plaintiff. *Saunderſon* was ſince dead, and nobody had adminiſtered to him. Motion for a *ne exeat regno* againſt the defendant, on an affidavit that he was going abroad, and in order to give the plaintiff time to obtain adminiſtration to *Saunderſon*; refuſed, becauſe the ſuit without the original repreſentative of *Saunderſon* muſt be diſmiſſed for want of parties. 3 *Bro. Ch. Rep.* 25. 1789. *May* v. *Fenwick.*

11. A writ of *ne exeat regno* muſt be on an equitable demand. 3 *Bro. Ch. Rep.* 218. 1791. *Atkinſon* v. *Leonard.*

12. Motion for a *ne exeat regno*, againſt the defendant, who was ſued as adminiſtratrix. The affidavits ſtated threats of abſconding, and of embezzling the effects of the teſtator; which might, according to general computation, be worth about 2000*l.* Motion refuſed, as no ſum was poſitively ſworn to, and there was no preciſe ſum for which the writ could be marked; alſo, for that there was no preciſe ground ſtated for the ſuggeſtion that the defendant was going abroad. 3 *Bro. Ch. Rep.* 370. 1791. *Shearman* v. *Shearman.*

13. Bill by two reſiduary legatees againſt a ſurviving executor. Motion for a *ne exeat regno* againſt *John Higgins*, the agent of the perſon claiming to be repreſentative of the deceaſed executor, on the ground that he had got into his poſſeſſion a bond from one *Palmer* to the deceaſed executor for 300 and odd pounds, which was the ſecurity for the reſidue; and the affidavit ſtated, that the deceaſed executor paid one of the plaintiffs regularly the intereſt, as his ſhare of the reſidue. No perſonal repreſentative of the deceaſed executor was before the court, there being a conteſt as to the repreſentation in the eccleſiaſtical court. The affidavit ſtated a declaration, that he was going abroad. The motion was refuſed. 3 *Bro. Ch. Rep.* 476. 1792. *Storey* v. *Higgins.*

14. Upon a ſuit in the eccleſiaſtical court by wife for alimony. *Quære*, whether *before* the decree the Chancellor will grant a *ne exeat regno* againſt the huſband. 1 *Veſ. jun.* 94. 1790. *Coglar* v. *Coglar.*

15. An affidavit to ſupport a motion for a writ of *ne exeat regno* muſt be poſitive. 5 *Veſ. jun.* 91. 1799. *Roddam* v. *Hetherington.*

16. A general affidavit of belief that the defendant means to quit the kingdom, is ſufficient, without the circumſtances upon which that belief is founded. 5 *Veſ. jun.* 96. 1799. *Ruſſel* v. *Aſby.*

17. Upon an application for a *ne exeat regno* no ſubpœna is ſerved; but upon perſonal ſervice of the writ the party is bound to appear and put in his anſwer, and then he may apply to ſuperſede the writ; but not upon affidavit. *Ibid.*

18. *Riſkings*, by deed of giſt in *March* 1799, gave all his property to plaintiff *Sarah Gardiner*, and to the defendant *Wm. Edwards*, in truſt for himſelf for life, and after his deceaſe to pay ſeveral ſums to different relations, and alſo 400*l.* and 800*l.* to defendant. By his will executed in *May* 1799, he appointed the plaintiff and defendant his executors, and died ſoon afterwards. The defendant, who was a mariner, poſſeſſed himſelf of property belonging to the teſtator to the amount of 1000*l.*, *as the deponent believed*, and after the teſtator's death defendant poſſeſſed himſelf of other property to the amount of another 1000*l.* The affidavit then ſuggeſted, that the defendant intended to go abroad; that he had declared his intention of going to *America*, without executing the truſts of the deed; having been accuſed of the murder of the teſtator; but the grand jury had thrown out the bill;

plaintiff

plaintiff ſuggeſted that ſhe was in danger from defendant. Motion refuſed. 5 *Vez. jun.* 593. 1800. *Barſtow* v. *Kilvington.*

(C) Directed, executed, and diſcharged. How. 15 Vin. 538.

1. ON motion to diſcharge a writ of *ne exeat regno* where the perſon lives out of the kingdom, Lord *Hardwicke* Chancellor, ſaid, it is a reaſon which generally prevails with me not to grant ſuch a writ, where one of the parties correſponding or dealing lives out of the kingdom, and the tranſactions were on the faith of having juſtice in the place where the parties reſpectively reſide: and ſo it has been held where one lived in *England*, and the other in one of the plantations or ſettlements abroad, which are governed by the ſame laws; but in *Gibraltar* and *Minorca* the laws are not the ſame as here; in the former the juriſdiction is not adapted to the determining property and accounts between merchants. In *Minorca* the *Spaniſh* method of juſtice prevails, and therefore the reaſon does not hold where one of the parties reſides in one of thoſe places. But I do not rely on that ſo much, as that there was no faith between the parties here, of having juſtice where they reſide; for two of them lived at firſt at *Gibraltar*, afterwards one of them removed to *Minorca*. His Lordſhip therefore ordered, that upon the defendant giving ſecurity in 1000*l.* by recognizance, with two ſureties, conditioned to abide and perform ſuch decree and orders as the court ſhould make in the cauſe; the *writ of ne exeat* be diſcharged. *Ambl.* 177. 1753. *Robertſon* v. *Wilkie.*

2. Writ of *ne exeat regno* obtained by one inhabitant of *Antigua* againſt another upon a bond ſtated in the bill to be loſt; diſcharged on giving ſecurity to abide by the decree. 3 *Bro. Ch. Rep.* 218. 1791. *Atkinſon* v. *Leonard.*

3. Writ of *ne exeat* diſcharged on payment into court of the ſum for which it was marked. 1 *Veſ. jun.* 96. 1790. *Evans* v. *Evans.*

4. Writ of *ne exeat regno* obtained by one *French* emigrant againſt another, diſcharged upon the circumſtances appearing upon the affidavits in ſupport of the bill, and upon the anſwer, which may be read: the application not being in the nature of an application to hold to bail, but to the diſcretion of the court, applying a remedy, not in its origin diſtinctly applicable to private tranſactions between ſubject and ſubject; it is very delicate to apply it as againſt foreigners; it would be a neceſſary term that it ſhould be ſimply a caſe of equity. 4 *Veſ. jun.* 577. 1799. *De Carriere* v. *De Calonne.*

5. Writ of *ne exeat regno* obtained by a reſident here, againſt a reſident in the *Weſt Indies*, upon a demand riſing there, when the anſwer came in, was diſcharged under the circumſtances with coſts, againſt *prochein amy* of the infant plaintiff, but upon the admiſſions in the anſwer the defendant was ordered to give ſecurity

to

to abide the decree. 5 *Ves. jun.* 91. 1799. *Roddam* v. *Hetherington.*

6. When a party is taken, he muſt give a bond to the Maſter of the Rolls, in ſuch penalty as is required by the writ for yielding obedience thereto, or ſatisfy the court by anſwer, affidavit, or otherwiſe, that he hath no deſign of leaving the kingdom, or that he is not indebted to the plaintiff in any ſum of money whatever, before the writ can be diſcharged. *Hind. Prac. Ch.* 612.

7. The preſent practice is for the defendant to give ſecurity to abide the decree, before the writ is diſcharged, which ſecurity is taken by recognizance before the Maſter. *Ibid.*

[G] Negative Pregnant.

15 Vin. 543. (A) What Plea ſhall be ſaid to be Negative Pregnant.

A Return to a *mandamus* (to certify the election of a recorder,) "that the corporation were not duly aſſembled to proceed "to the election of a recorder," is bad, becauſe it contains a negative pregnant. *Per Buller* J. The writ ſays, that the corporation being *duly aſſembled* proceeded to the election of a recorder, and the return is that they were not duly aſſembled to *proceed to the election of a recorder.* This means that they were duly aſſembled for ſome purpoſe, but not for the purpoſe of electing a recorder; but that mode of pleading cannot be ſupported. *Rex* v. *The Mayor, &c. of York,* 5 *Term Rep.* 79.

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15 Vin. 550. [C] Ne unques accouple.

A Replication to a plea of "*ne unques accouple*" in dower, alleging a marriage in *Scotland,* may conclude to the country; and in ſuch replication it is not neceſſary to ſtate that the marriage was had at any place in *England,* by way of venue. *Ilderton* v. *Ilderton,* 2 *H. Bl.* 145.

Night-walker.

[G]
15 Vin. 555.

1. BY 14 *G.* 3. *c.* 90. *ſ.* 14. watchmen are empowered to apprehend all *night-walkers*, malefactors, rogues, vagabonds, and other looſe and diſorderly perſons diſturbing the public peace, or whom they ſhall have cauſe to ſuſpect of any evil deſigns, and all perſons lying or loitering in any ſquare, ſtreet, court, lane, mews, yard, alley, paſſage, or place.

2. If a conſtable take up a perſon in the night, as a night-walker or diſorderly perſon, without any juſt ground of ſuſpicion, and any perſon comes to reſcue the party ſo detained, and kills the conſtable, or any that aſſiſts him, it has been held only man-ſlaughter, be the conſtable in his juriſdiction or not. *Queen* v. *Tooley*, 2 *Ld. Raym.* 1297.

3. To make an arreſt of a night-walker juſtifiable there ought to be probable cauſe of ſuſpicion. *Ibid.*

4. A conſtable is guilty of a miſdeanour, if he ſuffer a ſtreet-walker, delivered to his cuſtody by one of the nightly watch, to eſcape. *Rex* v. *Bootie*, 2 *Burr.* 866.

Nil dicit.

[G]
15 Vin. 556.

1. IF the declaration be delivered or filed, with notice to plead within the *firſt* four days of term, the defendant has all the morning of the *fifth* day to plead; and judgment cannot be ſigned for want of plea, till the opening of the office of the afternoon of that day. *Shepherd* v. *Mackreth*, *E.* 35 *G.* 3. *K. B.*

2. But in any other part of the term, if the defendant do not plead within the four days, the plaintiff may ſign judgment on the morning of the fifth day. 1 *Term Rep.* 16. 4 *Term Rep.* 195, 6. 5 *Term Rep.* 35.

3. Judgment may be ſigned for want of a plea, if the defendant do not rejoin. *Petrie* v. *Fitzroy.*

4. Judgment by *nil dicit* may likewiſe be ſigned, if the defendant pleads a plea not adapted to the nature of the action, as *nil debet* in *aſſumpſit*, &c. *Barnes*, 257.

5. So if the defendant after craving oyer of a deed, do not ſet forth the whole of it, the plaintiff may ſign judgment as for want of a plea. *Slater* v. *Horne*, 4 *Term Rep.* 370.

6. But

6. But the plea of not guilty, in an action of debt on a penal ſtatute, is not ſuch a nullity as will warrant the plaintiff in ſigning judgment. 1 *Term Rep.* 462.

7. In general, when the defendant pleads an improper plea, the ſafeſt courſe is, not to ſign judgment, but to demur, or move the court to ſet it aſide.

8. A demurrer, as in abatement to a replication to a plea in bar, held not to be a diſcontinuance, though the plaintiff might have taken judgment by *nil dicit*. 2 *Ld. Raym.* 1023.

[G]
25 Vin. 556.

Nil habuit in Tenementis.

1. IN debt for rent, on an indenture of leaſe, if the defendant plead *nil debet*, he cannot give in evidence that the plaintiff *had nothing in the tenements*, becauſe if he had pleaded that ſpecially, the plaintiff might have replied the indenture, and eſtopped him. 1 *Salk.* 278. 2 *Ld. Raym.* 1154. S. C.

2. A tenant who has agreed in writing to hold premiſes at a certain rent may allege, that the party with whom he made the agreement never had any intereſt in the premiſes, if ſuch party was never in poſſeſſion. Otherwiſe he cannot. *Chettle* v. *Pound*, 1 *Ld. Raym.* 746.

3. If both leſſee and leſſor ſign a leaſe, the former is eſtopped to plead *nil habuit in tenementis* to an action of debt for rent by the leſſor. *Wilkins* v. *Wingate*, 6 *Term Rep.* 62.

4. In an action of covenant for rent on an indenture brought by the aſſignees of the leſſor, (a bankrupt) the leſſee cannot plead that the leſſor *nil habuit in tenementis*. *Parker* v. *Manning*, 7 *Term Rep.* 537.

5. *Nil habuit in tenementis* is a bad plea to *aſſumpſit* for the uſe and occupation of lands; and in debt for rent on deed poll, it muſt be, plaintiff had nothing at the time of the action or at any other time. *Lewes* v. *Willis*, 1 *Wilſ.* 314.

6. It was moved to plead double, *nil debet* and *nil habuit in tenementis*. Refuſed. *Per cur.*—The latter may be given in evidence upon the former. *Barnes*, 333. *Sed vide Salk.* 277. *Supr. pl.* 1.

7. *Nil habuit in tenementis*, or any thing tantamount cannot be pleaded in an action of covenant. *Palmer* v. *Ekins*, 2 *Stra.* 817.

8. The defendant may plead *nil habuit in tenementis* to an action of covenant brought by the committee of a lunatic on a leaſe made by him as committee in his own name; for the committee of a lunatic cannot grant ſuch a leaſe. 2 *Wilſ.* 130.

Nolle prosequi.

See *Judgment* (G). *Nonsuit* (F. 2).

Nonsuit. [G]

(B. 2) For what.

15 Vin. 563.

1. ON all process issuing out of *K. B.* returnable at a day certain, if the defendant appear by his attorney and file bail of the term wherein the process is returnable, and the plaintiff do not declare before the end of the term next following, a *non pros* (*a*) may be signed, without entering any rule to declare, or calling for a declaration. *R. M.* 10 *Geo.* 2. *Reg.* 2. (*b*).

(*a*) It is called a judgment of *non pros*, from the words *non prosequitur*, &c. formerly used in entering it up. And this seems to be the proper appellation of the judgment in action by *bill*; but in actions by original, where the language of the judgmen was *non prosequitur breve vel* SECTAM, it is more commonly called a judgment of *nonsuit*. Tidd, K. B. 377.

2. Upon a *habeas corpus*, the plaintiff must declare, if at all, before the end of the *second term* after putting in bail, including the term in which it was put in. 1 *Stra.* 631. *Barnes*, 90. But *vide Cro. Jac.* 620. And also 6 *Term Rep.* 752. If he do not declare within that time, the defendant's attorney is not bound to accept a declaration. *R. M.* 16 *Car.* 2. (*c*). *Cowp.* 117. 1 *Term Rep.* 372.

3. Upon a *recordari facias loquelam*, however, by which both parties have a day in court, if the plaintiff do not appear, the defendant may sign a judgment of *non pros*. *Davies* v. *James*, 1 *Term Rep.* 371.

4. If the plaintiff do not reply, *sur-rejoin*, or *sur-rebut* within the time limited by the rule, or order for further time, the defendant may sign a judgment of *non pros*. *Tidd, K. B.* 625.

5. If the plaintiff, being ruled to enter the issue, do not enter it within the time allowed by the rule, a *non pros* may be signed. *R. M.* 4 *Ann.* (*c*).

6. But a judgment of *non pros* cannot be regularly signed after the issue is entered, though it be not entered within the time allowed by the rule. *Minus* v. *Baxter*, 1 *Term Rep.* 16. But see *Thompson* v. *Ryall*, 4 *Term Rep.* 195. *Semb. contrà*.

7. If

7. If on a writ of error the record be not certified in due time, the defendant in error may ſign a *non pros* for not certifying, but no coſts are allowed thereon. 2 *Term Rep.* 17.

8. If plaintiff in error neglect to allege diminution within the time allowed by the rule, the clerk of the errors, on being applied to, will ſign a *non pros.* 2 *Tidd, K. B.* 1138.

9. So, if he neglect to aſſign errors within the time limited by the rule or order, the defendant in error may ſign a *non pros. Ibid.* 1140.

10. The ſtat. 13 *Car.* 2. *ſ.* 2. *c.* 2. enabling a defendant to ſign judgment of *non pros* for want of a declaration in due time, extends to all caſes. *Oldham* v. *Burrel*, 7 *Term Rep.* 26.

11. By ſtat. 14 *Geo.* 2. *c.* 17. (made to remedy the delay and expence attending the trial by proviſo) if plaintiff neglect to bring iſſue to trial according to the courſe of the court, the court, on motion on notice, ſhall give *judgment as in caſe of a nonſuit*, unleſs they allow further time, and defendant to have coſts as in a nonſuit.

12. Allegation of facts *immaterial* but relative to the title of the party, though not neceſſary, yet, when introduced muſt be proved, otherwiſe the plaintiff will be *nonſuited. Briſtow* v. *Wright*, 2 *Dougl.* 665. But that rule holds only in *records* and *written* contracts. *Ibid.* 669. *n.*

15 Vin. 563.

(C) Who may be nonſuited.

1. A Plaintiff cannot be nonſuited without his conſent, after he has appeared. 2 *Term Rep.* 275. *Watkins* v. *Towers.*

2. A nonſuit can only be at the inſtance of the defendant, and therefore where the cauſe at *niſi prius* was called on, and jury ſworn, but no counſel, attornies, parties, or witneſſes appeared on either ſide, the judge held, that the only way was to diſcharge the jury; for nobody has a right to demand the plaintiff but the defendant, and the defendant not demanding him, the judge could not order him to be called. 1 *Stra.* 267. See alſo 2 *Stra.* 1117.

3. It ſeems that undertaking by a rule of court to give material evidence in the county of *A.* in order to fix the *venue* there, does not imply a conſent to be nonſuited if the party fail. 2 *Term Rep.* 281.

4. Where there are two or more defendants, and one ſuffers judgment to go by default, and the others go on to trial, the plaintiff cannot be nonſuited as to theſe, though he cannot prove his caſe, but the defendant muſt have a verdict. *Hannay* v. *Smith*, 3 *Term Rep.* 662.

5. In treſpaſs againſt *ſeveral*, if any ſuffer judgment by *default*, the plaintiff need only give evidence to affect the reſt; and it is matter for the jury, whether the treſpaſs proved be the ſame as that confeſſed, but the plaintiff cannot be *nonſuited. Harris* v. *Butterley*, 2 *Cowp.* 483.

(D) At what Time (a Man) may be nonſuited. 15 Vin. 564.

IT has been doubted, whether the plaintiff can be *nonſuited*, after bringing money into court; but there ſeems to be little reaſon for ſuch a doubt. When money is brought into court, unleſs the plaintiff will accept of it with coſts, in diſcharge of the ſuit, it is conſidered as paid before action is brought, and ſtruck out of the declaration, and the action proceeds for the reſidue of the demand, in like manner as if it had been originally commenced for that only. 3 *Term Rep.* 657. And accordingly the practice of nonſuiting the plaintiff, after money paid into court, appears to be ſupported by many authorities. See 2 *Stra.* 1027. 4 *Term Rep.* 10. 7 *Term Rep.* 372. 2 *H. Bl.* 374. and *Tidd, K. B.* 544. (*n. a.*)

(F. 2) The Difference between a Nonſuit, Retraxit, Nolle proſequi, Non pros, and Departure; and the Nature and Effect thereof. 15 Vin. 569.

1. IF there are ſeveral defendants, and all found guilty, plaintiff may enter *nolle proſequi* againſt any one; therefore, if in *trover* againſt a defendant executor, and other defendants not executors, there is a verdict againſt theſe, and the executor is found not guilty, judgment ſhall not be arreſted, for plaintiff may enter *nolle proſequi* as to him. *Dale* v. *Eyre*, 1 *Wilſ.* 306.

2. The court will not allow a defendant to ſtrike out the entry of a judgment of *nolle proſequi* entered by the plaintiff as to one of the counts of his declaration after it has been demurred to. *Milliken* v. *Fox*, 1 *Boſ.* & *Pull.* 157.

3. Where two defendants, in *aſſumpſit*, ſevered in pleading, and the one pleaded a bankruptcy, which, on iſſue joined, was found for him, it was held, that the plaintiff might enter a *nolle proſequi* as to him, and ſtill proceed to final judgment and execution againſt the other. *Noke* v. *Ingham*, 1 *Wilſ.* 89.

4. *Philpot* v. *Muller*, *B. R. T.* 23 *G.* 3. was an action of treſpaſs againſt two, who ſevered in pleading, and one of them ſigned judgment of *non pros* and ſued out execution thereon. The execution was a *ca. ſa.* in treſpaſs on the caſe, inſtead of treſpaſs. The judgment was of *E.* 23 *G.* 3. On a rule to ſhew cauſe why the judgment and execution ſhould not be ſet aſide for irregularity, *Buller* J. ſaid there was a great difference between a *nolle proſequi* (as in *Noke* v. *Ingham*, 1 *Wilſ.* 89.) and judgment of *non pros*, for that by the latter the plaintiff is out of court as to all the defendants. *Vide Dougl.* 169. (*n.* 56.)

5. A *nolle preſequi* is conſidered not to be of the nature of a *retraxit* or releaſe, but an agreement only, not to proceed either againſt ſome of the defendants, or as to part of the ſuit. And in theſe

theſe caſes it is held that a *nolle proſequi* may be entered againſt one of the defendants before judgment obtained againſt the other, notwithſtanding ſome deciſions to the contrary. *Gree* v. *Rolle*, 1 *Wilſ.* 90. *Noke* v. *Ingham*, *Ibid.* 90.

6. A *nolle proſequi* is now held to be no bar to a future action for the ſame cauſe, except in thoſe caſes indeed where from the nature of the action judgment and execution againſt one is a ſatisfaction of all the damages ſuſtained by the plaintiff. 3 *Term Rep.* 511.

7. It ſeems clear that where any action founded upon a tort, ſuch as aſſault and battery, falſe impriſonment, trover, and the like, is brought againſt ſeveral defendants, though they all join in the ſame plea and be found jointly guilty, yet the plaintiff may, after a verdict, enter a *nolle proſequi* as to ſome of them, and take his judgment againſt the reſt. 1 *Ld. Raym. Crux* v. *Lowther*, 1 *Wilſ.* 316. *Dale* v. *Eyre.*

15 Vin. 572. (H) In what Caſes the Nonſuit of the Plaintiff againſt one ſhall be for others. In what Actions.

1. IN a joint action it is ſaid the plaintiff cannot be *non proſſed* by one or more of the defendants without the others. *Powell* v. *White*, 1 *Dougl.* 169. And this is univerſally true in actions by *original*, where the plaintiff cannot proceed againſt the defendants ſeverally upon a joint writ. But upon proceſs in *treſpaſs*, if the plaintiff declare, ſerve a notice of declaration, or even take out a rule for further time to declare, againſt one or more of ſeveral defendants, and do not proceed againſt the others, the latter may ſign a judgment of *non pros.* *Roe* v. *Cock*, 2 *Term Rep.* 257.

2. Where there is a judgment by default againſt one defendant in a joint action the other cannot *nonſuit* the plaintiff at the trial, on iſſue joined by him, nor if the plaintiff neglect to proceed to trial, can he obtain judgment as in caſe of a nonſuit under 14 *G.* 2. *c.* 17. *ſ.* 1. *Weller* v. *Goyton and Walker*, 1 *Burr.* 358. *Cowp.* 485. S. P.

3. In treſpaſs againſt ſeveral, if the plaintiff is nonſuited before declaration, there ſhall be only one nonſuit as againſt all the defendants; for though he may declare ſeverally, it ſhall not be preſumed, till he does ſo. 1 *Comyns*, 74. 4 *Burr.* 2418.

4. If one of two defendants ſuffer judgment by default, and the other go to trial, the plaintiff cannot be nonſuited as to him; but ſuch defendant muſt have a verdict if the plaintiff fail to make out his caſe. *Honnay* v. *Smith and Williams*, 3 *Term Rep.* 662.

(L) When it ſhall be a Bar of other Actions and peremptory.

15 Vin. 575.

1. IF after nonſuit on the merits, and motion for a new trial denied, plaintiff bring a new action in another court, it will ſtay proceedings till coſts of the nonſuit paid, for this is vexatious. *Melchart* v. *Halſey*, 3 *Wilſ.* 149.

2. After a nonſuit in treſpaſs the court will ſtay proceedings in a ſecond action between the ſame parties for the ſame cauſe, until the coſts of the nonſuit are paid: notwithſtanding the plaintiff be a priſoner at the time of bringing the ſecond action, and ſue *in forma pauperis*. *Weſton* v. *Withers*, 2 *Term Rep.* 511.

(P) Of Judgment. Coſts. In what Caſes.

15 Vin. 582.

1. EXECUTORS are not liable to coſts upon a *nonſuit* or verdict, when they neceſſarily ſue in their repreſentative character, and cannot bring the action in their own right; as upon a *contract* entered into with the teſtator. 2 *Ld. Raym.* 1214. 1 *Stra.* 682. S. C. 1 *H. Bl.* 578.

2. But an executor or adminiſtrator is liable to coſts upon a judgment of *non pros*. *Hawes* v. *Saunders*, 3 *Burr.* 1586. *Higgs* v. *Warry*, 6 *Term Rep.* 654.

3. Where an executor merely ſues *en auter droit*, he is not liable to coſts upon judgment, as in caſe of a nonſuit. *Booth* v. *Holt*, 2 *H. Bl.* 277.

4. Where a defendant removes proceedings by a *recordari facias loquelam* from a county court into one of the ſuperior courts, and ſigns judgment of *non pros* in default of the plaintiff's appearing, he is entitled to coſts. Where by the writ each party has a day to appear in court, and the defendant may be damnified by the plaintiff's not appearing, he may appear and demand him; and if the plaintiff do not appear, the defendant is entitled to ſign judgment of *non pros*, and to have his coſts. *Davies* v. *James*, 1 *Term Rep.* 372.

5. Plaintiff ought to pay the coſts of one nonſuit only, where a *latitat* was awarded againſt four defendants, though they appeared ſeverally by different attornies, where the *nonſuit* was for not declaring within two terms. 1 *Comyns Rep.* 74. 4 *Burr.* 2418.

6. Adminiſtrator nonſuited in an action for tithes accrued in inteſtate's life, or in *trover*, when the converſion was in inteſtate's life, pays no coſts; but if in his own time he does. *Barnes*, 127. 129. 132.

7. If the court orders a nonſuit, the plaintiff pays the defendant his coſts. *Cameron* v. *Reynolds*, *Cowp.* 407.

8. Action againſt *two*; judgment againſt *one* by default; rule for judgment for the other as in caſe of a nonſuit purſuant to

14 *Geo.* 2. *c.* 17. *ſ.* 1. Yet this defendant cannot have his coſts taxed as in caſe of a nonſuit; becauſe *the caſe of a nonſuit does not here exiſt*; for if the plaintiff be nonſuited, he muſt be out of court, as againſt *both* defendants; whereas he has *obtained judgment* againſt *one* of them. *Weller* v. *Goyton and Walker*, 1 *Burr.* 358.

9. If a *qui tam* informer, on the ſtat. 21 *Hen.* 8. *c.* 13. for *non-reſidence* is *nonſuited*, the defendant is entitled to coſts. *Wilkinſon qui tam* v. *Allot*, 1 *Cowp.* 366.

10. If plaintiff enter into a conſolidation rule in actions on a policy of inſurance where defendant has paid money into court, and become nonſuit in one, he is *not* entitled to the coſts up to the time of paying money into court in the other actions that were not tried. *Burſtall* v. *Horner*, 7 *Term Rep.* 372.

11. The ſtatute 18 *Eliz. c.* 5. *ſ.* 3. which gives coſts to the defendant in a popular action if the plaintiff be nonſuit, extends to ſubſequent as well as prior ſtatutes. *Williams qui tam Drewe, Willes' Rep.* and *The Mayor, &c. of Plymouth* v. *Warring, Ibid.* 441.

12. An avowant for a rent charge is not entitled to double coſts under ſtat. 11 *Geo.* 2. *c.* 19. *ſ.* 22. when the plaintiff is nonſuited. *Lindon* v. *Collins, Willes' Rep.* 429.

13. If an executor declare on a trover and converſion in the teſtator's lifetime, and alſo on a trover and converſion after his death, the evidence offered being only applicable to the firſt count, and he be nonſuited, he is not liable to pay coſts. *Cockerell* v. *Kynaſton*, 4 *Term Rep.* 277.

14. If an executor ſue as ſuch for money received by the defendant ſince the teſtator's death to the plaintiff's uſe, and fail, he is liable to coſts. *Goldthwayte* v. *Petre*, 5 *Term Rep.* 234.

15. Where an executor was ſued on a policy of inſurance effected by his teſtator for himſelf and two others then living, and was nonſuited, the court of C. P. held, the executor ſhould not pay coſts, though the action might have been brought by the two ſurviving parties alone. *Wilton* v. *Hamilton*, 1 *Boſ. & Pull.* 445.

[G]

Non-tenure.

15 Vin. 586.

(A) Pleadable, in what Caſes or Actions.

TO a *ſcire facias* againſt a terre-tenant, upon a judgment in debt, or other perſonal action, the defendant cannot plead non-tenure *generally*, becauſe it is contrary to the ſheriff's return, who ſays, he has warned the defendant who is *tenant* of certain lands, *&c.*: but the defendant is at liberty to plead a *ſpecial non-tenure*, that is, he may ſay, that, before the judgment or recogni-

zance

tance *T. S.* was ſeiſed in fee and demiſed the lands to him for a term yet to come, and traverſe that on the day of ſuing out the writ of *ſcire facias*, or at any time after he was tenant as of freehold of the lands: or he may ſay, that he is only tenant by *elegit*, or ſtatute, and the like; and it is ſaid that the diſtinction between the plea of general and ſpecial non-tenure is now ſettled after long and great difficulty. *Adams* v. *Savage*, 2 *Lord Raym.* 1253. *Vide* 2 *Saund.* 12. (*n.* 19.)

Not Guilty. [G]

(A) Not Guilty. Pleadable. In what Caſes. 16 Vin. 1.

1. TO an action againſt an innkeeper for the negligent keeping of the goods of his gueſt, the defendant may plead *not guilty*; though he has matter of excuſe: as, that his inn was full, &c. 5 *Com. Dig.* 593. *Tit. Pleader.* (Q. 2).

2. Whether *not guilty* may not be pleaded to an action of debt on a penal ſtatute? *Quære. Coppin* v. *Carter*, 1 *Term Rep.* 462.

3. Defendant may plead *not guilty* to an action for deceipt in levying a fine in C. *B.* of land in *ancient demeſne*, whereby it becomes frank-fee, though matter of record is mixt with matter of fact. *R. Tr.* 10 *An. in C. B.* 5 *Com. Dig.* 587.

4. To *not guilty* in *aſſumpſit* the plaintiff demurred. *Et per curiam*, Though it would be good after a verdict, yet it is ill on demurrer, and the plaintiff had judgment. *Marſham* v. *Gibbs*, 2 *Stra.* 1022.

Notice. [G]

(A. 2) Requiſite. In what Caſes in general. 16 Vin. 2.

1. NOTICE of ſetting out tythes is not, by common law, neceſſary even to ſupport an action on the caſe for not fetching them away in time; but a cuſtom to give notice is good, and ſlight evidence will ſupport ſuch cuſtom. *Butter* v. *Heathby*, 3 *Burr.* 1891.

2. Notice of a *refuſal* to *accept* a bill of exchange muſt be given by the indorſee to the perſon from whom he received it. *Bleſſard* v. *Hirſt*, 5 *Burr.* 2671.

3. A reverſioner ſtands by and ſees the leſſees of tenant for life (who apprehend the leſſor had power to make ſuch leaſe,) lay out great ſums in improvements, without giving them notice, their term ſhall be ſupported in a court of equity. *Bunb.* 53.

4. In *quare impedit* notice of refuſal ought *in all caſes* to be given to the patron. *King* v. *Hereford* (*Biſhop of,*) 1 *Com. Rep.* 360. (*notes.*)

5. If a curate be removed by the rector for any fault, he ſhould have notice. 1 *Cowp.* 437.

6. If partners diſſolve their partneſhip, perſons who deal with either, *without notice* of ſuch diſſolution, have a right againſt both. *Ibid.* 449.

7. Where an ejectment has been brought on the demiſe of an infant, which is compromiſed, and the tenant in poſſeſſion attorns to the defendant, although the infant, on his coming of age, do not accept the rent, or do any act to confirm the tenancy, yet as the former ejectment was brought at his ſuit, and for his benefit, he ſhall not be allowed to conſider the tenant as a treſpaſſor, and bring a new ejectment without *notice to quit*. *Doe ex dem. Miller* v. *Noden*, 2 *Eſp. Rep.* 530.

8. If an infant ſues, the plaintiff's attorney muſt give notice of his guardian's place of abode. 1 *Wilſ.* 246.

16 Vin. 6.

(A. 3) Requiſite in what Caſes. In *Aſſumpſits.*

WHERE a third perſon is named in the conſideration of an *aſſumpſit*, of whom the defendant may inform himſelf, notice need not be given of performance. *Smith* v. *Goffe*, 2 *Ld. Raym.* 1127.

16 Vin. 8.

(A. 4) Requiſite. In what Caſes. In Matters of Practice in ſuperior Courts.

1. THE court will not diſcharge one committed by a juſtice for aiding in running goods, upon bail, without notice to the juſtice, and bringing his *habeas corpus*. *Rex* v. *Norton*, *Bunb.* 143.

2. Although notice has been given of a motion for judgment as in caſe of a nonſuit, for not proceeding to trial in due time after iſſue joined, on which the plaintiff enters into a peremptory undertaking to try, yet notice muſt alſo be given of the like motion for not proceeding to trial according to the undertaking. *Gooch* v. *Pearſon*, *C. B.* 1 *H. Bl.* 527.

3. Where iſſue is joined early enough in a term, notice of trial muſt be given in the ſame term. *Frampton* v. *Payne*, *C. B.* 1 *H. Bl.* 65.

4. Although the plaintiff has undertaken peremptorily to proceed to trial at the next aſſizes, yet the defendant is not bound to attend and be prepared with witneſſes, counſel, *&c.* without having had *notice of trial*. *Ilfield* v. *Weeks*, *C. B.* 1 *H. Bl.* 222.

5. When the cauſe has been ſuſpended, after *iſſue* joined, for above a year, the defendant is entitled to a term's *notice* of trial. *Hayley* v. *Ryley*, 1 *Dougl.* 71. But not if he himſelf has ſtopped the plaintiff by an *injunction*. *Ibid.*

6. Notice muſt be given of the execution of a writ of *ſcire fieri* inquiry. *Steed* v. *Layner*, 2 *Ld. Raym.* 1382. 1 *Stra.* 235. *acc.*

7. Notice of motion muſt be given to quaſh a writ. 1 *Wilſ.* 30.

8. By ſtat. 24 *G.* 2. *c.* 44. *ſ.* 1. it is enacted, That no action ſhall be brought againſt a juſtice of the peace for any thing done in the execution of his office until a month's notice has been given, which notice ſhall clearly and explicitly contain the cauſe of action.

9. A ſimilar notice is required to be given to officers of the exciſe and cuſtoms by the 23 *G.* 3. *c.* 70. *ſ.* 30. and 24 *G.* 3. *ſeſſ.* 2. *c.* 47. *ſ.* 35. Upon theſe ſtatutes it has been holden that the month begins the day on which the notice is ſerved. 3 *Term Rep.* 623. And then an exciſe officer is entitled to notice, before an action is brought againſt him, for an act not warranted by his official capacity, if done *bonâ fide* in the ſuppoſed execution of his duty, ſuch as the aſſaulting of an innocent perſon whom he ſuſpects to be a ſmuggler employed in running goods. *Daniel* v. *Wilſon*, 5 *Term Rep.* 1.

10. In caſes where the cauſe of action does not amount to 10*l.* (ſtat. 5 *G.* 2. *c.* 27. *ſ.* 4.), or where it amounts to 10*l.* and upwards, but no affidavit is made thereof, an *Engliſh notice* muſt be written on the copy of the proceſs ſerved on the defendant of the intent and meaning of ſuch ſervice.

11. When the declaration is *delivered*, a *notice* to plead ſhould be *indorſed* on it. But when it is filed, the notice need not be indorſed, but ſhould be left at the laſt or moſt uſual place of abode of the defendant or his attorney. 7 *Term Rep.* 26.

12. If the venue be in *London* or *Middleſex*, and the defendant live within forty *computed* miles from *London*, there muſt be in general eight days notice of inquiry, excluſive of the days it is given, which notice is alſo ſufficient in country cauſes. For the ſtat. 14 *G.* 2. *c.* 17. *ſ.* 4., which requires *ten* days notice of trial at the aſſizes does not extend to notices of inquiry. But where the venue is laid in *London* or *Middleſex*, and the defendant lives above forty computed miles from *London*, there muſt be *fourteen* days notice of inquiry. *Vide* 1 *Tidd's Prac.* 490.

13. Where a term's notice of trial is required, there muſt at the ſame diſtance of time be the like notice of inquiry.

14. Where it is deemed neceſſary at the trial to produce any deeds, papers, *&c.* in the poſſeſſion of the oppoſite party, a *notice* ſhould be given to produce them.

15. When a priſoner intends to take the benefit of the lords' act, he muſt give to every creditor, at whoſe ſuit he is in execution, a *notice* in writing purporting that he intends to petition the court, and ſetting forth a true copy of the ſchedule he intends to deliver in, which notice muſt be given *fourteen* days before the petition is preſented. 32 *G.* 2. *c.* 28. *ſ.* 13.

16 Vin. 9. (A. 5) Requiſite to avoid being, or to make a Man a *Tort feaſor*.

THE lord of a manor, who is alſo a juſtice of the peace, is entitled to a month's notice of an action brought againſt him, for taking away a gun in the houſe of a perſon unqualified to kill game, by the ſtat. 24 *G.* 2. *c.* 44., for it will be preſumed that he acted as juſtice. *Briggs* v. *Sir F. Evelyn*, 2 *H. Bl.* 114.

16 Vin. 13. (G) Of what the Law takes notice.

1. THE court will not take judicial notice of the cuſtoms of *London*. *Baſs* v. *Hickford and Wife*, *Andr. Rep.* 376.

2. But the court takes notice of ſuch cuſtoms of *London* as have been *certified* by the *Recorder*. *Blaquiere* v. *Hawkins*, 1 *Dougl.* 378.

3. But will not take notice of the cuſtom in *London* that an action ſhall lie for calling a woman a "*whore*," becauſe it has not been certified. *Staunton* v. *Jones*, 1 *Dougl.* 378. (*in notis*).

4. But the city courts take *notice* of the cuſtoms of the city. *Ibid.* 381. (*notes*).

5. The court is bound to take notice of the commencement, prorogations, and ſeſſions of *parliament*. *Vide* 1 *Dougl.* 97. (*n.* 41). Even when the proceedings are on a private ſtatute. *Ibid.*

6. It ſhould ſeem, however, that the court will not take notice of *miſrecitals* of private ſtatutes in other reſpects, without *nul tiel record* is pleaded. *Ibid.*

[G] 16 Vin. 1.

Novel Aſſignment.

1. IN treſpaſs, where the day is made material by the plea, the plaintiff's laying another in his new aſſignment is no departure. 2 *Ld. Raym.* 1015.

2. If in an action of aſſault the day is material, and the defendant pleads *ſon aſſault*, the plaintiff muſt new aſſign the day; otherwiſe if the defendant prove *ſon aſſault* any day previous to the action, it will do. *Randle* v. *Webb*.

3. But as the common way for the plaintiff to have two or three counts in his declaration, ſo that the defendant is under a neceſſity of pleading the general iſſue to ſome of them (for if he juſtify two, he admits two, and conſequently, unleſs he can prove two juſtifications, muſt have a verdict againſt him), he may prove another battery without being put to make a novel aſſignment. *Bull. N. P.* 17.

4. If

4. If *A.* be in poſſeſſion of part of a houſe, and *B.* of the other part, and an officer enter into *A.*'s part under a writ againſt *B.*'s goods, which are not there, *A.* may maintain an action againſt the officer for breaking and entering his houſe, and need not make any new aſſignment to a juſtification under the writ againſt *B.* *Fallon* v. *Anderſon*, 1 *Peake's N. P.* 110.

5. Aſſault and impriſonment. Defendant juſtifies under a *capias ad reſpondendum*. Plaintiff replies, the defendant releaſed him from the arreſt and afterwards arreſted him, and prays judgment, becauſe the defendant has acknowledged the treſpaſs; this is naught, and plaintiff ought to have made a *new aſſignment*. *Scott* v. *Dixon*, 1 *Wilſ.* 3.

6. Where a declaration for falſe impriſonment againſt *A.* and *B.* contained two counts, to both of which the defendants pleaded not guilty, and juſtified the firſt under meſne proceſs, *A.* as the plaintiff in that action, and *B.* as the bailiff, and the plaintiff by *a new aſſignment* admitting the arreſt to be lawful, replied that *B.*, with the conſent of *A.*, voluntarily releaſed him, and that they afterwards impriſoned him for the time mentioned in the firſt count; the plaintiff, having failed in proving *the new aſſignment*, by not ſhewing the conſent of *A.*, ſhall not be permitted to prove the ſame treſpaſs againſt *B.* under the other count. *Atkinſon* v. *Mattiſon*, 2 *Term Rep.* 172.

7. Where in treſpaſs a grant of a way, common, *&c.* is pleaded, if the defendant has uſed the way, *&c.* in a different manner from what he is entitled to do under the grant, the plaintiff muſt *new aſſign*. *Senhouſe* v. *Chriſtian*, 1 *Term Rep.* 560.

8. Where in actions for breaking and entering the plaintiff's houſe or land, felling his timber, or taking away his goods, the defendant pleads a licenſe, which the plaintiff had revoked before any of the treſpaſſes were committed; or which was confined to ſome particular thing, and the defendant exceeded it; the plaintiff muſt ſtate the revocation or exceſs in a new aſſignment. *Vide* 1 *Saund.* 300. *Green* v. *Jones*, (*note* 6.)

9. There are ſome replications which rather partake of the *nature* of new aſſignments than are properly and ſtrictly ſo. As where a man abuſes an authority or licenſe which the *law* gives him, by which he becomes a treſpaſſer *ab initio*; if the defendant plead ſuch licence or authority, the plaintiff muſt reply the abuſe. *Dye* v. *Leatherdale*, 3 *Wilſ.* 20. *Taylor* v. *Cole*, 3 *Term Rep.* 292. *Gundry* v. *Feltham*, 1 *Term Rep.* 338.

Oath.

16 Vin. 49. (B) The Force thereof where there is Oath againſt Oath.

1. WHERE there is a ſingle depoſition only againſt the oath of a defendant in his anſwer, and the facts denied in the anſwer are equally ſtrong with thoſe that are affirmed by the depoſition, there the rule that you can have no decree upon ſuch ſingle evidence, againſt the defendant, will hold; but where, as in the preſent caſe, there are a great many concurring circumſtances that ſtrengthen and ſupport the depoſition of this witneſs, it does not come within the aforementioned rule. 2 *Atk.* 19. 1739. *Walton* v. *Hobbs.*

2. On evidence of an agreement being confeſſed by the defendant, it was decreed to be carried into execution, though the agreement was proved by one witneſs only, and poſitively denied by the defendant's anſwer. 3 *Atk.* 407. 1740. *Only* v. *Walker.*

3. Bill by the original leſſees of a leaſehold eſtate, againſt the aſſignee of the leaſe, for a ſpecific performance of an undertaking ſtated in the bill, to indemnify the plaintiffs againſt all rents and covenants, to be paid or kept on the leſſee's part toward the original leſſor, and to execute a bond for ſecuring ſuch indemnity; the aſſignment had been by ſale by auction, the conditions of ſale did not ſtipulate the indemnity ſtated in the bill, and it was ſupported only by the evidence of *Hogard* the auctioneer, who ſwore ſuch agreement was entered into by the plaintiff and defendant before the ſale; the anſwer denied the agreement; the defendant, the original aſſignee, had made another aſſignment of the leaſe to a third perſon (not a party) before the bill brought. Lord Chancellor—"Where the defendant in expreſs terms negatives the allegations of the bill, and the evidence is only one perſon affirming what has been ſo negatived, there the court will neither make a decree, nor ſend it to a trial at law. Where the court does ſend it to a trial at law, it orders the anſwer to be read in evidence, and ſends it to a court of law only to find the conſequences; becauſe the court of equity has ſuch a rule, therefore it refers it to a court of law what a court of equity ought to do, as in *Lord Milton* v. *Edgworth*, 6 *Bro. Par. Caſ.* 580.; but the rule is ſubject to this modification, that if there are circumſtances ſufficient to turn the ſcale it ought to be framed upon the circumſtances. I do not incline to ſend it to a trial. I think the plaintiff ought to have his decree." It being however ſuggeſted that Mr. *Fell* was preſent at

at the execution of the deed, his Lordſhip ſent it to law. 1 *Bro. Ch. Rep.* 53. 1779. *Pember* v. *Mather.*

4. A ſingle witneſs cannot prevail againſt a poſitive denial by anſwer. 3 *Veſ. jun.* 170. 1796. *Lord Cranſtown* v. *Johnſton.*

(C) In what Caſes the Plaintiff's Oath is neceſſary. 16 Vin. 49.

1. WHERE a man prefers his bill to have diſcovery only of deeds, and (having the counterpart) to have the deeds eſtabliſhed, there he ought to annex an affidavit to his bill, that he has not the original deeds, nor any other perſon in truſt for him, or elſe it is cauſe for demurrer; but if relief be not prayed, as well as diſcovery, there is no need of an affidavit. *Bunb.* 47. 1719. *Johnſon* v. *Elleker.*

2. Where a bill prays relief as well as diſcovery, an affidavit muſt be annexed that the plaintiff has not the deed in his cuſtody. 3 *Atk.* 17. 1743. *Anon. and Dormer* v. *Forteſcue, Ibid.* 132.

Occupant.

(G) Who may be a ſpecial Occupant. 16 Vin. 73.

1. *A.* being ſeiſed of a church leaſe to him and his heirs during three lives, by ſettlement before marriage limited it to the uſe of himſelf for life, and to the firſt and every other ſon in tail male; a perſon may take ſuch eſtate ſo granted in fee, determinable upon lives by way of remainder, as ſpecial occupant. 1 *Atk.* 524. 1737. *Norton* v. *Frecker.*

2. A ſpecial occupancy may be of a freehold leaſe. 3 *Atk.* 708. 1749. *Hearle* v. *Greenbank.*

3. Teſtator deviſes all his manors, meſſuages, lands, tenements, tithes, and hereditaments, and all his real eſtate whatſoever, except what is hereinafter mentioned and deviſed, to the uſe of all his children ſucceſſively in ſtrict ſettlement; and gave two of them annuities, which he charged upon a rectory held by him under a leaſe for lives, which he directed to be renewed, if thoſe two children or either of them ſhould be living at his death; and that their lives or that of the ſurvivor ſhould be inſerted in the new leaſe, and the fine paid out of his perſonal. He gave part of his perſonal ſpecially; and declared the reſidue to be laid out in land to be ſettled to the ſame uſes as his real; but afterwards, by a teſtamentary paper unatteſted, he diſpoſed of his perſonal otherwiſe: the heir contracted to ſell the leaſe of the rectory; and upon a caſe directed to the court of king's bench, on his bill

bill for a ſpecific performance, the certificate was that the leaſe did not paſs by the will, but devolved on the heir as ſpecial occupant; but the chancellor thought it too doubtful a title to be forced on a purchaſer. 2 *Veſ. jun.* 526. 1795. *Sheffield* v. *Lord Mulgrave.*

Own Oath.

16 Vin. 155.

(A) Allowed. In what Caſes.

WHERE at law a perſon is allowed ſums under 40*s.* on his oath, he muſt ſwear poſitively, and not to his belief only; ſo under a decree that the perſon upon an account ſhould be allowed ſuch ſums as he ſwears he has actually expended, he muſt peremptorily ſwear to the fact. 2 *Atk.* 410. 1742. *Sir John Robinſon* v. *Cumming.*

Vide Oath.

[G]

Obligation.

16 Vin. 64.

(P) Where the Obligations are joint or ſeveral, or both. Rules, Pleadings, &c.

1. WHERE the covenant is joint and ſeveral, in an action againſt one only, the breach may be aſſigned in the neglect of both. *Lilley* v. *Hedges,* 1 *Stra.* 553.

2. If one named in an indenture do not ſeal, he muſt be excluded by an averment: or they may join in the action. *Vernon* v. *Jefferies,* 2 *Stra.* 1146.

3. After *oyer* of the condition, and *non eſt factum* pleaded to a debt on bond, on which iſſue is joined, and notice of trial given, the plaintiff may enter a ſuggeſtion on the roll, and aſſign breaches purſuant to the ſtatute, (8 & 9 *Wil.* 3. 11.) but it is irregular to deliver ſuch ſecond iſſue without a ſummons and judge's order. *Etherſey* v. *Jackſon,* 8 *Term Rep.* 255.

4. To debt by an obligee of his anceſtor, the heir cannot plead that he has laid out money in repairing the premiſes, and claim to retain on that account. 1 *Term Rep.* 454.

5. If

5. If the obligor of a bond, after notice of its having been aſſigned, take a releaſe from the obligee, and plead it to an action brought by the aſſignee in the name of the obligor, the court will ſet the plea aſide; and they will not, under theſe circumſtances, allow the obligor to plead payment of the bond. *Legh* v. *Legh*, 1 *Boſ. & Pul.* 447.

6. A releaſe by plaintiff's teſtator ſealed, cannot be pleaded to a debt on bond. *Parſons* v. *Coward*, *H.* 10 *Geo.* 2. *Burr.* 357.

7. *Per curiam.* According to 1 *Saund.* 291. if the defendant in debt upon a bond would take advantage of another's being jointly bound, he muſt plead it in abatement, and cannot demur upon *oyer*; for if he does, the court will preſume the other did not ſeal it. There was a demurrer here, and the plaintiff had judgment. *Gilbert* v. *Bath*, 1 *Stra.* 503.

8. So in caſe of a joint promiſſory note the defendant can only plead in abatement. *Rex* v. *Abbott*, *Cowp.* 832. *Vide* 5 *Burr.* 2611. *Bull. N. P.* p. 129.

9. If three be bound jointly and ſeverally in a bond, the obligee cannot ſue two of them only, but he muſt either ſue them all, or each of them ſeparately. *Per Buller* J. *Streatfield* v. *Halliday*, 3 *Term Rep.* 782.

10. *A.* gave *B.* a bond to ſecure an annuity, and before any payment became due *A.* lent *B.* a ſum of money; on which it was agreed that *B.* ſhould retain the payments of the annuity, as they became due, till that ſum was diſcharged; then *B.* became bankrupt; and the agreement to retain was held a good plea to an action on the bond by *B.*'s aſſignees for the payments accruing after the bankruptcy, being equivalent to a plea of *ſolvit ad diem.* 3 *Term Rep.* 599.

11. In debt on bond from defendant's teſtator and *A.* jointly and ſeverally, if defendant pleads, that teſtator, in his lifetime, and *A.* paid off the bond, and plaintiff replies, they did not pay it *modo et forma*, *&c.*, and it appears that teſtator paid part in his life, and *A.* the reſt after his death, this does not maintain the plea. *Hudſon* v. *Stalwood*, *Burr.* 133.

12. If the obligee of a bond covenant not to ſue one of two joint and ſeveral obligors, and if he do, that the deed of covenant may be pleaded in bar, he may ſtill ſue the other obligor. *Dean* v. *Newhall*, 8 *Term Rep.* 168. *Vide Lacy* v. *Kynaſton*, 1 *Lord Raym.* 690.

13. To debt on bond to ſave harmleſs ſtom expences by reaſon of naming one to a curacy, or from ſuits by reaſon thereof, if the defendant plead *non damnificatus*, the plaintiff may reply and aſſign for breach, that he was obliged to pay ſuch a ſum by reaſon of ſuch nomination, without ſaying *how* he was obliged. 2 *Wilſ.* 11.

14. A bond conditioned for payment of money on the 25th of *December*; a ſubſequent deed between the ſame parties, by which the obligee covenanted, that if the obligor ſhould pay, on the 25th of *December*, 5*s.* in the pound, *&c.*, ſuch payment ſhould be accepted in full diſcharge and ſatisfaction of all ſums due, *&c.*, and

and might be pleaded and given in evidence, &c.: the obligor (to an action on the bond) pleaded a tender and refusal of the 5*s.* in the pound on the 25th of *December*, and holden good. *Trevett* v. *Angus*, *Willes' Rep.* 107.

15. If the obligee in a joint and several bond make one of two obligors his executor, with others, the action on the bond is discharged as to both obligors. *Cheetham* v. *Ward*, 1 *Bos. & Pul.* 630.

16. But where *A.* as surety and *B.* as principal are jointly and severally bound to *C.*, *B.* becomes insolvent, and *C.*, the obligee, receives a dividend from his effects, and covenants not to sue *B.*, and that if he do so, the deed of covenant may be pleaded in bar, *C.* may nevertheless sue *A.*, for this is only a release to *B.* by construction. *Dean* v. *Newhall*, 8 *Term. Rep.* 168.

17. A contract made by two partners to pay a certain sum of money to a third person *equally* out of their own private cash is a *joint* contract, and they must be sued jointly upon it. *Byers* v. *Dobey*, 1 *H. Bl.* 236.

18. Upon a *joint bond*, the action cannot be brought against *one* of the obligors *only*. This was the point in the case of *Horner* v. *Moor*. *Non est factum* was pleaded, and the jury found it the deed of *both*. Mr. Serjt. *Hewitt* moved in arrest of judgment, upon the face of the declaration. He acknowledged that it could not be moved in arrest of judgment, if it had not appeared upon the face of the declaration, but it there appeared that both had sealed the obligation, and that both were living. He owned, that if it had not appeared upon the face of the declaration, it must have been averred. The counsel for the plaintiff gave it up, and the judgment was arrested. *Vide* 5 *Burr.* 2614.

[G] # Office or Inquisition.

16 Vin. 87. ## (G. 2) Traversed. In what Cases, and how.

1. IF on a commission to inquire whether *A.* is an alien it is found against the king, he cannot have another new commission in the same county, but he may a *melius inquirendum*; and if that also is found against the king, it is conclusive; if for him, *A.* may traverse. *Ex parte Duplessis*, 2 *Ves.* 438.

2. The person against whom a commission of lunacy issued, on the different appearance made upon the second inspection, was allowed to traverse the inquisition, and the grant of the custody suspended till further order. *Ex parte Roberts*, 3 *Atk.* 6.

3. After

3. After *B.* had been found a lunatic under two inquiſitions, the court would not allow him to traverſe the ſecond. *Ex parte Barnſley*, 3 *Atk.* 184.

4. Where an inquiſition finds a perſon an idiot, the court thinking it hard, would not grant the cuſtody, without giving leave to traverſe the inquiſition. *Ibid.*

5. Not only the lunatic, but the heir of the lunatic, is bound upon the traverſe of the inquiſition. *Ex parte Roberts*, 3 *Atk.* 308. *Vide ex parte Grimſtone*, *Amb.* 706.

6. Where the alienee and the lunatic traverſe, if he is found a lunatic at the time of alienation, the alienee is bound. 3 *Atk.* 312.

7. The traverſor of an inquiſition of lunacy found for the king, ſhall be conſidered as a defendant, and therefore the record ſhall be made up and carried down to trial by the proſecutor. *Rex* v. *Roberts*, 2 *Stra.* 1208.

8. When an inquiſition is traverſed, ſecurity is taken to the value of two years' profits of the lands. *Rex* v. *Barlow*, *in St. Tr.* 1718. *Bunb.* 25.

(H. 2) Proceedings.

16 Vin. 95.

1. NOTICE of iſſuing a commiſſion for an inqueſt of office, to inquire whether lands are not eſcheated, ſhall not always be given; but on circumſtances the court will grant it. *Rex* v. *Daly*, *Tr.* 1749, *in Scac.* 1 *Veſ.* 269.

2. Where there is any miſbehaviour in the execution of an inquiſition of lunacy, the court, upon examining into it, may, if they ſee cauſe, quaſh it, and direct a new commiſſion. *Ex parte Roberts*, 3 *Atk.* 6.

(Q) Pleadings.

16 Vin. 100.

1. TO an inquiſition on an extent on an outlawry, the defendant, as terre-tenant, may plead that the party outlawed is dead, without ſetting forth ſpecial title. *Rex* v. *Barnfield*, *H.* 1721. *Bunb. Rep.* 102.

2. A writ of *diem clauſit extremum* ſhall not be ſet aſide on motion, for defendant may plead to the inquiſition. *Rex* v. *Michener*, *Bunb.* 118.

3. If a term of years is found and ſold on an inquiſition on an outlawry, a mortgagee not in poſſeſſion ſhall be allowed to plead to the inquiſition. *Rex* v. *Blunt*, *Bunb.* 104. *Semb.*

4. On an outlawry, inquiſition returned thereon, *levari* iſſued, and money levied, he who has a ſtatute-merchant, and is in poſſeſſion of the land, may, on motion, have time to plead to the outlawry and inquiſition; and, on giving ſecurity, have the money in the ſheriff's hand repaid him. *Rex* v. *Tollet*, *Bunb.* 123.

5. If

5. If on inquiſition a man is found poſſeſſed of a term in right of his wife, and after his death it is ſold on *venditioni exponas*, the widow ſhall be permitted to plead to the inquiſition, though ſhe has defended an ejectment brought by the purchaſor, and filed a bill in Chancery. *Watts* v. *Robinſon*, *Bunb.* 220.

[G] Other Action pending.

26 Vin. 148. (F) Pleadings. How the Pleadings muſt be.

IT is ſaid, in one caſe, that the pendency of a prior action for the ſame cauſe may be pleaded *in bar* to the ſecond action; but cannot be pleaded in abatement. *Say. Rep.* 216. This, however, muſt be underſtood with reference to the particular caſe of a *qui tam* action, and not as a general rule applicable to all caſes. *Tidd. K. B.* 560.

[A] Officers and Offices.

26 Vin. 121. (N & O) Forfeiture. By what Act or Thing.

A Mandamus was moved for to reſtore Serjeant *Burland* to the office of Recorder of *Wells*, from which he had been removed. It appeared that two grounds of forfeiture were charged againſt him: Firſt, that he had refuſed to adminiſter the oath to the returning officer at an election there, and had adminiſtered it to another perſon, and aſſiſted to hold the election contrary to the adjournment of the returning officer. But as it appeared clearly that he had acted from miſtake and not from corrupt motives, the court held this to be no cauſe of forfeiture. The other ground was, his having once neglected to attend his duty at ſeſſions. But it appearing that he had no particular notice to attend; and that no particular buſineſs was expected or did come on, and that the ſeſſions might be held without him; the court held this not to be ſuch *craſſa negligentia* as ſhould forfeit the office. *Rex* v. *The Corporation of Wells.*

(O. 4) Discharged or determined. In what Cases, and the Effect thereof. 16 Vin. 130.

1. ON a mandamus to restore a recorder, they returned that he was only an officer at pleasure, and that another had been chosen, & *per inde* the former removed; and it was held good. *Rex* v. *Mayor of Canterbury.*

2. If a minister be suspended, during the suspension the place is full; for it only is an impediment to the enjoying any benefit from the office, and if his consent be necessary to any particular thing, he is as much empowered to consent as ever he was. *Philips* v. *Bury*, 2 *Term Rep.* 351.

(L. 2) Deputy. What he may claim as such. 16 Vin. 134.

THE plaintiff, prothonotary of the palace court, appointed the defendant his deputy; and it was agreed that the defendant should have certain fees, and should account for the rest. New fees, arising from a change in the practice of the court, shall go to the principal, and not to the deputy who has stipulated for a certain portion. *Bulstrode* v. *Gilburn*, 2 *Stra.* 1027.

Overseers. [A]

For what Place to be appointed. 16 Vin. 414.

1. AN appointment of two substantial householders in the precinct of the *Tower within, otherwise called the parish of* St. Peter ad vincula, to be overseers of the poor of the *said precinct*, is bad; for it is not an appointment for a parish under 43 *Eliz.*, nor for a township or village under 13 & 14 *Car.* 2. A precinct may be more or less than a parish, and the *alias dict.* don't help it, for the words going before it are presumed to be the true name. *Rex* v. *Leven and Arnold, Sayer* 278. 3 *Burn's Just.* 308.

2. An extra-parochial place, consisting of *two houses* and 300 acres of land, is not a township or village within 13 & 14 *Car.* 2. *Rex* v. *Denham, Burr. S. C.* 35. 2 *Stra.* 1004. 2 *Sess. Ca. No.* 171. and *Cases in B. R.* 7, 8, 9 & 10 *G.* 2. *c.* 163.

3. An extra-parochial place, once consisting of a capital messuage and three keepers' lodges in the park now disparked, and consisting of five dwelling houses and farms occupied by five tenants,

tenants, but never having had overſeers appointed, is not a townſhip or village within the ſtatute. *Rex* v. *The Manor of Grafton*, *Burr. S. C.* 101. 2 *Stra.* 1071.

4. It is a good return to a mandamus, directing the appointment of overſeers, that the extraparochial place is not a village, and is not, nor ever was reputed to be a village or townſhip. *Rex* v. *Welbeck*, 2 *Stra.* 1143. 2 *Bott* by *Conſt*, 24 *Pl.* 43.

5. An order was quaſhed which appointed overſeers to a place conſiſting of a capital meſſuage, two ancient and a newly erected cottages, all occupied by the under-tenants of *S.*, who reſided in the capital meſſuage; for, *per* Lord *Mansfield*, C. J. by theſe means a place may be made into a village which is not ſo, and the inhabitants, by contrivance, withdraw themſelves from maintaining the poor of the pariſh. *Rex* v. *Showler and Atter*, 3 *Burr.* 1391.

6. The ſcites and areas of ancient cathedrals, colleges, and inns of court, are extra-parochial, and for ſuch places, either legally or by reputation, overſeers cannot be appointed. *Rex* v. *The Juſtices of Peterborough*, *Cald.* 238.

7. To obtain a mandamus for the appointment of overſeers, it muſt expreſsly be ſworn that the place in queſtion is or is not reputed to be a vill. *Rex* v. *Juſtices of Bedfordſhire*, *Cald.* 167.

8. Where the ſeſſions had adjudged as a fact that *Ronton-Abbey* was a vill by reputation, upon the evidence ſtated in the caſe, the court are precluded from going into that queſtion. *Rex* v. *Ronton-Abbey*, 2 *Term Rep.* 207.

For a Townſhip under 13 & 14 *Car.* 2. *c.* 12. *ſ.* 21.

1. ON ſhewing cauſe to a rule why a mandamus ſhould not iſſue to compel the juſtices to appoint overſeers for the townſhip of *Kentiſh Town*, it appeared by the affidavits, that this pariſh has always had two overſeers; that one rate was made for the whole pariſh, which each overſeer collected and paid within his own diviſion, they accounting with each other for the ſurplus and dividing it equally. *Per Cur.*. This has never been conſidered as a ſeparate pariſh; what is declared in the affidavits ſhews that they can do very well under 43 *Eliz.* To bring this within 13 & 14 *Car.* 2. they muſt ſhew this to be a diſtinct vill or townſhip. We expected they would have ſhewn that they had ſeparate overſeers, maintained their own poor ſeparately, and had a ſeparate rate. Rule diſcharged. *Rex* v. *Juſtices of Middleſex*, 1 *Bott*, by *Conſt*, 35. *Pl.* 49.

2. A pariſh, 20 miles in length and 8 in breadth, had four overſeers, who were made by one joint appointment, one being nominated out of each diſtrict, till 9 *G.* 1. It had alſo one rate by which the poor of the whole pariſh were relieved, and four church-wardens. The quarter ſeſſions in the 9 *G.* 1. ordered that the ſeveral townſhips within the pariſh ſhould maintain their poor ſeparately, which was acquieſced in above 40 years. *Per* Lord *Mansfield*.

Manſfield. The policy of 13 & 14 *Car.* 2. is miſtaken. The diviſions ought rather to be enlarged than diminiſhed; it ought to appear that there was an inability in the pariſh to have the benefit of 43 *Eliz.* Quite the contrary appears here for a great number of years. Their acquieſcence under the diviſion was upon a falſe notion that the ſeſſions had the power to make it, which they had not. They ought to appoint overſeers for the whole pariſh. *Peart* v. *Weſtgarth*, 3 *Burr.* 1610.

3. So where a pariſh, conſiſting of five townſhips, had ſeparate appointments of overſeers, and a joint maintenance of its poor until 1730, ſince when they have generally maintained them ſeparately; and it was not ſtated as a ſubſtantive fact that the pariſh had not had the benefit of 43 *Eliz.* *Per Cur.* it muſt appear that there was a diſability to reap the benefit of 43 *Eliz.* Here the contrary appears, for there was a joint maintenance, and acquieſcence for a number of years won't alter the law. *Rex* v. *Uttoxeter*, *Dougl.* 332. *Cald.* 84. *Rex* v. *Beeding*, *otherwiſe Seal*, S. P.

4. A pariſh conſiſted of eight townſhips, each of which had been immemorially, a ſeparate conſtable and churchwarden, two of them from time immemorial, and a third for 70 years have had ſeparate overſeers. For the remainder there was a joint appointment of overſeers and a general rate, one overſeer being choſen out of and acting for each townſhip. But at the end of the year there was a general ſettlement of all diſburſements, and the expences borne equally by all. On a motion for a mandamus to appoint overſeers for one of the remaining five, the court reſolved. 1. That where there was a conſtable there was a townſhip. 2. That this townſhip could not reap the benefit of 43 *Eliz.* For that act means that all the diviſions of the pariſh ſhould join in maintaining their poor *as a pariſh.* But here three townſhips have ſeparate overſeers. Beſides, the remaining townſhips have five overſeers, which affords a ſtrong argument to prove that if even they were comprehended in a pariſh diſtinct from the other three they could not enjoy the benefit of 43 *Eliz.*, which allows only four overſeers. *Rex* v. *Sir Watts Horton et al.* 1 *Term Rep.* 374. *Vide* alſo *Rex* v. *The Inhabitants of Leigh*, 3 *Term Rep.* 746.

5. The pariſh of *Kirkby-Stephen* conſiſted of 10 townſhips, one of which had the ſame name, and all maintain their reſpective poor and have ſeparate overſeers. A pauper was removed by an order directed to the officers of the PARISH OF *K. S.*, and adjudging him ſettled in that pariſh, and delivered with the pauper to the overſeer of the TOWNSHIP OF *K. S.* who did not appeal. About a year after, this townſhip removed the pauper to another townſhip in the ſame pariſh where he had previouſly been ſettled. *Sed per Cur.* The original order to the pariſh of *K. S.* muſt mean the townſhip of *K. S.*; the poor not being maintained by the whole pariſh, but by the particular townſhips. The townſhip of *K. S.* could not have got rid of the order but by appealing againſt it, and they are concluded by not having done ſo. *Rex* v. *Kirkby Stephen*, *Burr. S. C.* 664.

By whom, and in what Numbers to be appointed.

1. TWO juſtices appointed a ſingle overſeer. The court held the appointment good, for it don't appear but that another may have been appointed by another order. *Rex* v. *Beſland*, 1 *Bott* by *Conſt.* 15 *pl.* 30. 1 *Wilſ.* 128. *Rex* v. *Morris*, 4 *Term Rep.* 550. *Nol. Rep.* 31. S. P.

2. An appointment of five overſeers is bad, and the ſtatute requires the appointment of either four, three, or two. *Rex* v. *Loxdale*, *Burr.* 445. *Vide* alſo *Rex* v. *Harman*, 1 *Bott* by *Conſt*, 13. *pl.* 29. and *Rex* v. *Morris*, 4 *Term Rep.* 550. *Nol. Rep.* 31.

3. The ſeſſions have no original juriſdiction to appoint overſeers. *Flag* v. *Chalmerton*, *fol.* 8.

4. But they have upon appeal the ſame latitude of diſcretion in judging who are fit to be nominated overſeers as the two juſtices had. If they aſſign no reaſon, their order is good, for the court will preſume that they acted on proper grounds. *Rex* v. *James Gayer*, *Eſq.* 1 *Burr.* 245.

5. An appointment of overſeers by two juſtices, if ſigned ſeparately, is bad; for it is a judicial act wherein the juſtices are to exerciſe their diſcretion. *Rex* v. *Forreſt et al.* 3 *Term Rep.* 38.

6. The pariſhioners may appeal to the ſeſſions under 43 of *Eliz.* againſt an appointment of overſeers, as well as the perſons ſo appointed. *Ibid.*

Who may be appointed, and how ſtyled in the Order.

1. APPOINTMENT quaſhed, which deſcribed the perſons appointed as principal inhabitants and not ſubſtantial houſeholders. *Rex* v. *Weobley*, 2 *Stra.* 1216. *Rex* v. *Morral*, *Bott*, *pl.* 3. S. P. and *Rex* v. *Great Marlow*, *Ib. pl.* 2. and *Rex* v. *Sherringbrook*, *Lord Raym.* 1394. *Sed vid. Rex* v. *Morris*, 4 *Term Rep.* 550. *Nol. Rep.* 31. *Vide cont.*

2. An order quaſhed becauſe it only called them ſubſtantial houſeholders, without adding theſe, or in the pariſh. *Ib.*

3. A woman may be appointed an overſeer of the poor. *Rex* v. *Alice Stubbs*, 3 *Term Rep.* 395.

4. Houſeholders, although labourers and poor, may be appointed overſeers, where there are no other perſons to ſerve who are more opulent. *Ib.*

5. Where a diſtrict contains only three houſes, the inhabitants of all three may be appointed overſeers. *Ib.*

6. *Quære*, whether one who is a juſtice of peace and lieutenant of marines can be appointed overſeer. *Rex* v. *James Gayer*, *Eſq.* 1 *Burr.* 245.

7. By

7. By 2 *G.* 3. *c.* 30. no perſon, ſerving for himſelf as a private man in the militia, ſhall, during the time of ſuch ſervice, be liable to ſerve as overſeer of the poor.

8. By 18 *G.* 2. *c.* 15. freemen of the corporation of ſurgeons in *London* are exempted from the office of overſeer of the poor.

At and for what Time.

1. IN *Rex* v. *Butler* Lord *Mansfield* doubted whether an appointment of overſeers on *Sunday* was not clandeſtine and void. *Blackſt. Rep.* 649. *Sed vid. Rex* v. *Clerkenwell, Foley*, 4. *contra.*

2. Two adverſe ſets of borough juſtices met before the midnight of *Eaſter Eve*, and each began making appointments of overſeers the inſtant the clock had ſtruck twelve, and one ſet made a freſh appointment at eight next morning. Lord *Mansfield* ſaid he knew of no authority which ſays that an appointment made on *Sunday* is good; that this was a ſhameful proſtitution of office to election purpoſes; and *per Cur.* let all the appointments be ſet aſide, and a mandamus be directed to the juſtices to make a new one. The mayor to give two days' notice of the time and place of meeting. *Rex* v. *The Overſeers of Bridgewater, Cowp.* 139. *Sed vid. Rex* v. *Merchant and Allen, Juſtices of Bridgewater, Eaſt.* 9 *G.* 3. 1 *Bott* by *Conſt*, 21. *pl.* 37.

3. The appointment of overſeers, although made more than a month after *Eaſter*, is not void, for it would ſubject the pariſh to great inconveniences. The ſtatute is only directory, and inflicts a penalty of 5*l.* for not following ſuch directions. *Rex* v. *Sparrow*, 2 *Seſſ. Ca.* 140. *Stra.* 1123. 1 *Bott* by *Conſt*, 17. *pl.* 35.

4. Appointment of overſeers for a whole year is good, although *Eaſter*, when new ones are to be appointed, being a moveable feaſt, the time of their ſervice may either exceed or fall ſhort of that in which others ſhould be choſen. *Rex* v. *Jones, Bott, pl.* 16. *Rex* v. *Great Marlow, fol.* 5.

5. An order was made on *Eaſter Wedneſday* 1766, appointing the defendants overſeers of the poor for this preſent year 1766. This is a good appointment for a year; for, by the court, it manifeſtly means the overſeers' year; and where this conſtruction may be taken two ways, it ſhould be taken in that ſenſe which makes the order good. *Rex* v. *Helling et al.* 3 *Burr.* 1905.

6. Objection to an appointment by which the defendants *were on the 6th of* October *appointed overſeers for the year next enſuing the date thereof*, but overruled on the authority of *Rex* v. *Sparrow*, as it might be taken to mean only the overſeers' year. *Rex* v. *Alice Stubbs*, 2 *Term Rep.* 395. *Vid.* alſo *Rex* v. *J. Burder*, 4 *Term Rep.* 778. *Nol. Rep.* 111.

Overſeers' Accounts.

1. MANDAMUS to the juſtices to grant a warrant for levying the balance of the laſt overſeers' accounts ſtill in their hands. Return that the veſtry had ordered the overſeers to retain that balance and employ an attorney to ſue for ſome charity money, and that the balance was exhauſted in fees, and the overſeers had engaged to pay the attorney, and therefore they had refuſed the warrant. *Per Cur.* There muſt go a peremptory *mandamus*, for the ſtatute ſays the balance ſhall be paid over to the new overſeers, under a penalty, and it is not in the power of the veſtry to diſpenſe with the ſtatute. *Rex* v. *Juſtices of Somerſetſhire*, *Stra.* 992.

2. The defendant had received, as overſeer of the poor, 4*l.* previous to his becoming a bankrupt, which was on the 5th *December* 1785; his accounts were not made out till the *Eaſter* following, and he had been committed by two juſtices for not paying over the 4*l.* as the balance. It was moved for an *habeas corpus* that he might be diſcharged, on the ground that it appeared from his accounts that the debt exiſted previous to the bankruptcy, and might have been proved under the commiſſion, and the defendant had ſince obtained his certificate. *Per Cur.* This motion can only be ſuſtained on the ground that the pariſhioners had a cauſe of action againſt the defendant before the bankrupty, but the pariſh could not have ſued, nor had they a right to call for the money till a fortnight after *Eaſter* 1786. Even if the ſum had been kept by itſelf, the bankrupt's aſſignees could not have touched it. Rule diſcharged. *Rex* v. *Egginton*, 1 *Term Rep.* 369.

3. A mandamus was moved for to the juſtices to ſwear a late overſeer to his accounts, upon an affidavit made by himſelf that he was ready to ſwear to the truth thereof. It was objected that the account conſiſted of groſs ſums, and that he had refuſed to anſwer ſome queſtions touching the particulars. *Per Cur.* A *mandamus* is of courſe. If the juſtices have any legal objection, they may return it upon the *mandamus*. *Rex* v. *The Juſtices of Middleſex*, 1 *Wilſ.* 125.

4. A *mandamus* will lie againſt the old overſeers to compel them to deliver their books and papers to their ſucceſſors. *Rex* v. *Bletſoe*, *Mich.* 7 *G.* 2. 1 *Bott* by *Conſt*, 260. *pl.* 276.

5. Juſtices may fine overſeers as well as impriſon them for refuſing to account. *Rex* v. *Sedgecold*, 1 *Bott* by *Conſt*, 260. *pl.* 277.

6. A *mandamus* was granted to oblige the old overſeer to deliver over the books of the poor rates to the new one; for, by the court, they are public books, and the churchwardens and overſeers for the time being ought to have the cuſtody of them, that the pariſhioners may have acceſs to them. *Rex* v. *Clapham*, 1 *Wilſ.* 305.

7. An appeal againſt an overſeer's accounts is given generally by 43 *Eliz.* to any enſuing ſeſſions at any diſtance of time, and this

this is not repealed by 17 *G.* 2. But if the appeal is not made to the next ſeſſions the court cannot award coſts. 3 *Burn's Juſt.* 677. *Rex* v. *Juſtices of Berkſhire*, 1 *Bott* by *Conſt*, 266. *pl.* 292. *Rex* v. *Bowen*, 1 *Bott* by *Conſt*, 263. *pl.* 290.

8. The inhabitants may appeal againſt a rate aſſeſſed for the purpoſe of reimburſing overſeers for the expence of law proceedings, and they need not wait to appeal againſt the overſeers' accounts, for they are aggrieved ſo ſoon as the money is improperly aſſeſſed upon them. *Rex* v. *Micklefield*, *Hil.* 25 *G.* 3. 1 *Bott* by *Conſt*, 269. *pl.* 293.

9. On appeal againſt an allowance of the account by two juſtices, the ſeſſions ordered the overſeer to pay ſo much over, which they adjudged to be in his hands, and, for not doing it, committed him. *Sed per Cur.* They ſhould have levied the arrears by diſtreſs and ſale, and, in default of diſtreſs, committed him, for they muſt execute their judgment in the ſame manner with the two juſtices. *Rex* v. *Hedges*, 3 *Salk.* 535.

10. Motion to quaſh an order of ſeſſions relating to accounts of overſeers, becauſe it did not appear that they had been before two juſtices *quorum unus*. It was urged againſt this that it appeared that there was *an allowance*, for the appeal is ſaid to be *againſt the diſburſements and the allowance thereof*. *Sed per Cur.* It don't follow that it was an allowance by two juſtices, for the pariſh might do it. The order muſt be quaſhed for want of juriſdiction. *Rex* v. *Bartlet*, *Stra.* 983.

11. Original order was made at ſeſſions on an appeal of the preſent overſeers, directing their predeceſſors to pay them the balance of their accounts. The court were of opinion that it muſt be quaſhed, for the ſeſſions had no right to make ſuch an order in the firſt inſtance, without a previous application being made to two juſtices, purſuant to 43 *Eliz. c.* 2. *ſ.* 4 & 6. and that 17 *G.* 2. made no alteration in this reſpect. *Rex* v. *Whitear et al.* 3 *Burr.* 1365.

12. On an appeal againſt the allowance of an overſeer's accounts, the ſeſſions diſallows ſeveral *items*, but their order don't proceed to direct him to pay the amount of them to his ſucceſſor. Two juſtices out of ſeſſions may enforce payment; for the effect of the appeal was to aſcertain the *quantum* of the arrears, and then the ſtatute attaches and enables the magiſtrates out of ſeſſions to enforce payment of the balance. If the juſtices refuſe, the court will grant a mandamus to compel them to hear the complaint. *Rex* v. *Sir John Carter et al.* 4 *Term Rep.* 246.

13. *F. T.*, having advanced money to the relief of the poor when churchwarden, informed the inhabitants at their meeting that he was conſiderabley in diſburſe, and prayed a rate to reimburſe him. This was refuſed on the ground that the late pariſh officers had ſufficient in their hands, upon the balance of their accounts, to reimburſe him; and they agreed that it ſhould be applied to the purpoſe. This balance was received by the preſent churchwardens and overſeers. The ſeſſions made an order upon them

to pay *F. T.* the ſum due to him, which was affirmed in B. R. *Rex* v. *Limehouſe, Bott, pl.* 100.

14. An order was made at the quarter ſeſſions upon the preſent overſeers, directing them to pay to the late ones certain ſums due upon their accounts, and another ſum paid by one of them to an attorney for buſineſs by him done for the pariſh, but was quaſhed by the court of K. B. for inſufficiency. *Rex* v. *St. Peter's the Great, Chicheſter, ſol.* 33.

15. Overſeers cannot take credit for money paid as a ſalary to an aſſiſtant overſeer, although ſuch aſſiſtant be appointed with ſuch ſalary at a veſtry meeting. *Rex* v. *Welch et al. Hil.* 25 *G.* 3. 1 *Bott* by *Conſt*, 277. *pl.* 304.

Diſobedience of Perſons made Overſeers, how puniſhed.

1. REFUSING to take upon one the office of overſeer is an indictable offence, and the penalty appointed by the ſtatute is only for neglect of duty in the office. *Rex* v. *Jones*, 2 *Seſſ. Ca.* 187. *Stra.* 1146. 1 *Bott* by *Conſt*, 298. *pl.* 347.

2. The pariſhioners, as well as overſeers who are appointed, may appeal to the ſeſſions againſt ſuch appointment, under 43 *Eliz. c.* 2. *ſ.* 6. *Rex* v. *Forreſt*, 3 *Term Rep.* 38.

3. A pauper was kept with her two baſtards in the poor houſe more than a year, and then allowed one ſhilling a week towards the maintenance of herſelf and children. Afterwards the officers refuſed to continue the payment, but offered to take her and her children into the poor houſe. The ſeſſions made an order on the officers to allow her a ſhilling *per* week towards her maintenance and that of her children. The officers were indicted for refuſing to obey; and a caſe being reſerved for the opinion of the judges, they determined that upon the words of 9 *G.* 2. *c.* 7. *ſ.* 4. and under the circumſtances of the caſe, the defendants were empowered by law to refuſe payment. *Rex* v. *Carliſle*, cited and holden to be authentic *per* Lord *Mansfield* C. J. in *Rex* v. *Winſhip and Greenwell, Cald.* 72.

4. The court granted an information againſt an overſeer for removing a poor woman very ſick and near her time into another pariſh, to avoid the expence which might be incurred by her delivery in his own. *Rex* v. *Buſby*, 1 *Bott* by *Conſt*, 296. *pl.* 344. *Vide* alſo *Rex* v. *Tarrant, lb.* 301. *pl.* 351. 4 *Burr.* 2106.

5. So alſo for conſpiring to marry a *pauper*. *Rex* v. *Herbert*, *Stra.* 757.

6. The court refuſed to quaſh an indictment againſt overſeers for not paying over money to their ſucceſſors. *Rex* v. *King*, *Stra.* 1208. *Vide* alſo *Rex* v. *Pardy et al.* 1 *Bott* by *Conſt*, 300. *pl.* 350.

7. Motion to quaſh an order of ſeizure for neglects with reſpect to the office of overſeer. The order of ſeizure ſets forth *that the defendant*

defendant was guilty of eleven neglects of the office, and therefore orders 11*l.* to be levied purſuant to the act. The court were of opinion that this was an order from the words of adjudication in it, and not a mere warrant of diſtreſs, and therefore the court will take notice of it. It was inſiſted in ſupport of the rule, that it did not appear that the defendant had notice of the order of appointment before the order of ſeizure was made; that five of the neglects were for abſence from monthly meetings, four for abſence from other meetings, one that his maid refuſed to take the rate book, and the laſt becauſe he refuſed to take half a year's pariſh rate tendered to him. The court being of opinion that ſome of the acts puniſhed as neglects (among which were the refuſal by his maid of the rate book and his refuſal of the rate) not being ſuch, and the whole being comprehended in one judgment, and a groſs ſum directed to be levied, quaſhed the order; 2nd *per Probyn* J. here are 11 penalties for 11 diſtinct neglects of quite different natures, and they ought to be diſtinctly levied for each offence. *Rex* v. *Harman*, 1 *Bott by Conſt*, 297. *pl.* 346.

Protection in their Office.

1. TRESPASS againſt the overſeers of the poor for taking a gelding. Juſtification, that by virtue of their office, and in purſuance of a juſtice's order, they levied ſatisfaction for a poor rate, which was the treſpaſs complained of. It was objected at the trial, that by 24 *G.* 2. *c.* 44. a demand ſhould have been made of the peruſal and copy of the juſtice's warrant and ſix days' neglect and refuſal. On a motion for a new trial, the court of K. B. were of opinion that all officers acting under a juſtice's warrant are within the benefit of that ſtatute. *Jackſon*'s caſe, *Lofft*, 249. S. C. *Clayt.* 45.

2. In an action of treſpaſs againſt an overſeer of the poor, on account of ſomething done by virtue of the 43 *Eliz. c.* 2. a verdict was found for the defendant; but the jury omitted to aſſeſs the treble damages given by that ſtatute. *Deniſon* J. If judgment had been entered up, the award of a writ of inquiry would have been too late, but as it has not, the court may award one. But a ſuggeſtion muſt be entered on the *poſtea*, that the defendant was an overſeer of the poor, and that the action was brought againſt him for a thing done by virtue of 43 *Eliz.* *Bennet* v. *Hart*, *Sayer's Rep.* 214. *Say. Law of Dam.* 245. S. C.

For more concerning *Overſeers*, *vide Orders of Removal*, *Poor*, *Rates*, *&c.*

[G] Oyer of Records, Deeds, &c.

(B) Given, of what Thing.

1 Vin 159.

1. OYER of *deeds, &c.* is demandable by the plaintiff or by the defendant. If the plaintiff in his declaration *neceſſarily* make a *profert in curia* of any deed, writing, letters of adminiſtration, or the like, the defendant may pray *oyer*, and muſt have a copy thereof given to him, if demanded. *R. T.* 5 & 6 *Geo.* 2. (*b*).

2. Formerly the defendant was allowed *oyer* of the original writ, in order to demur or plead in abatement for any ſuppoſed inſufficiency or variance. (2 *Wilſ.* 97.) But this indulgence having been abuſed and made an inſtrument of delay, a rule was made, that a defendant be not allowed *oyer* of an original writ. *R. T.* 19 *Geo.* 3. *Dougl.* 227, 8. 6 *Term Rep.* 363.

3. It ſeems that *oyer* is not demandable of an act of parliament. 1 *Dougl.* 476.

4. Nor of a record, as letters patent *enrolled* in Chancery. *Rex* v. *Amery*, 1 *Term Rep.* 149.

5. If there are two counts for the ſame debt on one policy of inſurance, defendant cannot have *oyer* of two policies. *Burr.* 243.

6. Where an original leaſe was loſt, the court, on application, has ordered that a copy of the counterpart ſhould be deemed good *oyer*. By *Buller* J. *Read* v. *Brookman*, 3 *Term Rep.* 160.

3 Vin. 163.

(D) Demanded. In what Caſes, it may or muſt be demanded, and how.

1. WHERE defendant is entitled to have *oyer* of a deed, plaintiff having made *profert* of it, it cannot be diſpenſed with by the court, nor can he be compelled to plead without it, even though the deed be loſt. *Soreſby* v. *Sparrow*, 2 *Stra.* 1186. See 3 *Term Rep.* 153.

2. But where the deed is in the hands of a third perſon the court will oblige him to give *oyer*, and produce it. 2 *Stra.* 1198.

3. So likewiſe where the deed was tortiouſly in the hands of the defendant. *Mathiſon* v. *Athiſon*, 3 *Term Rep.* 153. (*note c.*)

(F) Demanded or given, at what Time. 16 Vin. 164.

1. *OYER* muſt be demanded before rule to plead is out. *Barnes*, 241. 329. 268. 326.

2. And by the plaintiff *oyer* cannot be demanded in another term than that in which the plea is filed. *Per Buller* J. 1 *Term Rep.* 149.

3. There is no ſettled time preſcribed for the *plaintiff* to give *oyer*; but the defendant ſhall in all caſes have the ſame time to plead after *oyer* given as he had at the time of demanding it. *Powel* v. *Gay*, 2 *Stra.* 705. *R. T.* 5 & 6 *Geo.* 2. (*b.*) *Webber* v. *Auſtin*, 8 *Term Rep.* 356.

4. So ſhall the plaintiff where the defendant makes a *profert*. *Imp. Prac. K. B.* 243.

5. *Oyer* of a deed cannot, in ſtrictneſs, be demanded but during the term it is pleaded. 1 *Term Rep.* 149.

6. And as a general imparlance is always to a ſubſequent term, it follows, that *oyer* of a deed cannot be demanded after ſuch imparlance. (But ſee 2 *Ld. Raym.* 290.) A different doctrine is indeed laid down in one caſe, (12 *Mod.* 99. and ſee 2 *Show.* 210.) which muſt be underſtood of a *ſpecial* imparlance to another day in the ſame term. *Tidd's Prac. K. B.* 501.

7. The demand of *oyer* is a kind of plea, and ſhould regularly be made before the time for pleading is expired. *Fowler* v. *Dyer*, *M.* 20 *Geo.* 3. *Tidd's Prac.* 502.

8. If it be not made till after that time, the plaintiff may conſider the demand as a nullity, and ſign judgment. But though *oyer* be not, in ſtrictneſs, demandable, yet if it be given, the party demanding has a right to make uſe of it. *Jeffery* v. *White*, 2 *Dougl.* 476.

9. The time allowed for the defendant to give *oyer* of a deed, &c. to the plaintiff, is two days excluſive after it is demanded. 2 *Term Rep.* 40. If not given in that time, plaintiff may ſign judgment. *Barnes*, 245.

10. If given, the plaintiff ſhall have the ſame time to reply after *oyer* given him by the defendant as he had at the time of demanding it. *R. T.* 5 & 6 *Geo.* 2. (*b*).

11. *Oyer* demanded after rule to plead expired too late, no ſtay of judgment, though affidavit was for delay. *Barnes*, 241. 239.

(G) Pleadings. 16 Vin. 166.

1. DEFENDANT may either ſet forth the *oyer* in his plea or not, at his election. *Simmons* v. *Parminter*, 1 *Wilſ.* 97.

2. If *oyer* is granted of any inſtrument of record, and it is ſet forth, although the party was not entitled to ſuch oyer, yet he ſhall

ſhall therefore be entitled to take the whole inſtrument as part of his adverſary's plea. *Jeffery* v. *White*, 2 *Dougl.* 475.

3. *Peckham* moved for a rule to ſhew cauſe why the defendant ſhould not wave his demand of *oyer*, and plead. This was an action on a bond. The plaintiff had before filed a bill in the Exchequer for a diſcovery, and the defendant in his anſwer admitted that he had executed ſuch a bond, and that he had deſtroyed it. *Buller* J. You have declared with a *profert*; and after that the court cannot ſay the defendant ſhall not have *oyer*. You ſhould have declared that the bond was deſtroyed, and then it would have appeared on the record that the defendant was not entitled to *oyer*. All that we can do for you is to order that the production of a copy ſhall be *oyer*. But the plaintiff having no copy of the bond, and only the ſubſtance of it being ſtated in the bill in the *Exchequer*, a rule was obtained to ſhew cauſe why the declaration ſhould not be amended. *Totty* v. *Neſbitt*, *Tr.* 24 *Geo.* 3. *B. R.* 3 *Term Rep.* 153. (*notes*).

4. Defendant after *oyer* may plead the general iſſue, without taking notice of the *oyer*, and plaintiff cannot, when he makes up the iſſue, inſert the *oyer* at the head of the pleas; if he would avail himſelf of it, he muſt pray it to be enrolled at the head of his replication at his own expence. 2 *Stra.* 1241. *Willes*, 288. (*n. c.*)

5. In *C. B.* if *oyer* be prayed and not pleaded, plaintiff may inſert it in the plea: it is only where it is not prayed, that he is obliged to inſert it in his replication. *Barnes*, 327.

6. If defendant, after having craved *oyer* of a deed, do not ſet forth the *whole* deed, the plaintiff may ſign judgment as for want of a plea, or the court will quaſh the plea. *Wallace* v. *Cumberland*, 4 *Term Rep.* 370.

7. If defendant pleads variance between writ and count, without *oyer*, he ſhall anſwer over. *Vanderplank* v. *Banks*, 2 *Wilſ.* 85.

8. In order to bring error, the party who inſiſts upon *oyer* muſt enter his prayer on record. This is in the nature of a plea; and the other ſide may either counterplead or demur to it, and the court will give judgment thereon. 2 *Ld. Raym.* 969. But it is no error to grant *oyer* where it ought not to be. *Ibid.*

9. Where a deed is pleaded the plaintiff cannot reply new matter in the deed, but muſt ſet it out upon *oyer*. *Stibbs* v. *Clough*, 1 *Stra.* 226.

10. Plaintiff may ſign judgment for non-payment for copy of indentures of which *oyer* was prayed. *Barnes*, 238.

Parceners.

(A) *Of what Thing* there may be Parceners. 16 Vin. 168.

TO the paſſage cited from *Co. Litt.* 165. *b.* in *pl.* 1. *&c.* of the ſect. to which this is a ſupplement, Mr. *Hargrave* has ſubjoined the following note:

" In a late conteſt about the office of *Great Chamberlain*, which " aroſe in conſequence of the late Duke of *Ancaſter*'s leaving two " ſiſters his co-heireſſes, one of whom was married to Mr. *Burrel*, " the then Attorney-General made a report in conformity to the " doctrine here ſtated by Lord *Coke*, as to the office of high conſta- " ble; and this report, of which I have a copy, contains a very " learned inveſtigation of the ſubject. But afterwards, when the " caſe came before the lords, the judges gave it as their opinion, " *that the office belongs to both ſiſters; that the huſband of the eldeſt is* " *not of right entitled to execute it; and that both ſiſters may execute it* " *by deputy to be appointed by them, ſuch deputy not being of a degree in-* " *ferior to a knight, and to be approved of by the king.* See *Journ.* " *Dom. Proc.* 25. *May* 1781, *the Printed Caſes of the ſeveral Claim-* " *ants, and the Parl. Reg. for* 1780, 1, *v.* 4. 258 to 297. *Harg.* " *note* 8. *Co. Litt.* 165. *b.*"

(E) What Privileges the *eldeſt* or *her Iſſue* ſhall have, 16 Vin. 171.

TO the paſſage cited from *Co. Litt.* 166. *b.* in *pl.* 3. of the ſect. to which this is a ſupplement, reſpecting the privilege of an eldeſt co-parcener to preſent to an advowſon, Mr. *Hargrave* has ſubjoined the following note:

" *Acc. P.* 18. *E. Quare Impedit* 176. *Poſt.* 186. *b.* 3 *Co.* 22. *b.* " 2 *Inſt.* 365. 2 *Ro. Abr.* 346. *Mallory's Quare Impedit*, 145. " Three judges alſo held accordingly, *Eaſt.* 23 *Eliz.* in *Harris* " and *Haies* v. *Nichols*, *Cro. Eliz.* 18. But *Anderſon*, Chief Juſ- " tice, doubted, whether a grantee ſhould have the privilege. In " *Kielway* there is a caſe of 18 *Hen.* 7. in which *Frowicke*, Chief " Juſtice, is made to give it to the grantee of the eldeſt ſiſter, " only where it has been once exerciſed by herſelf. But he af- " terwards doubted his own diſtinction, and ſeemed to incline " to the grantee's right generally; in conſequence of which the " report concludes thus: *ſtude bene et quære. Keilw.* 49. Upon " the whole therefore it ſeems, that the point is not quite ſettled; " and to determine it properly would require a very careful exami- " nation of the numerous caſes cited by Ld. *Coke* here and in the

" ſecond

" ſecond Inſtitute. See 7 *Ann. c.* 18. I was led into this note, " by a reference to the caſe from *Cro. Eliz.* in a *Coke upon Lit-* " *tleton* of the late Mr. *Beverſham Filmer*; and by an opinion of " the ſame very learned gentleman, in which he repreſents the " point to be doubtful, and therefore diſſuaded accepting the " title to the next preſentation of an advowſon belonging to three " ſons as heirs in gavelkind, unleſs they would all join in the " grant." *Harg. note* 2. *Co Litt.* 166. *b.*

26 Vin. 175. (L) Ouſter. What ſhall be ſaid a Diſſeiſin by one of the other.

IN a writ of error from the Court of King's Bench in *Ireland*, the caſe was, that a Roman Catholic died ſeiſed of certain lands, leaving two ſons, *R.* and *J.* By the *Iriſh* ſtatute 2 *Anne*, eſtates in fee ſimple or fee tail belonging to Roman Catholics, deſcend in gavelkind; but, on the death of the Catholic *R.* entered alone, and held the ſame until his death, for ſixty-two years, and in the mean time ſettled the ſame by fine and recovery, to which *J.* his brother was privy. On the death of *R.*, in 1766, leaving two daughters, *J.*, the leſſor of the plaintiff, brought an ejectment againſt his two nieces, for two-thirds of a moiety of the lands whereof his brother died ſeiſed, as co-heir in gavelkind with his brother, and recovered them by default. He then brought an ejectment againſt the widow of *R.* for the other third of the moiety, which ſhe claimed as her dower, and alſo under the ſettlement. On the trial the judge directed the jury to find a verdict for the plaintiff; upon which a bill of exceptions was tendered, ſetting out in ſubſtance this caſe, which was returned into B. R. in *Ireland*, and thereupon the court gave judgment for the defendant. A writ of error was then brought in B. R. at *Weſtminſter*, and it was argued for the defendant, that ſixty-two years ſole poſſeſſion, and the fine, were a bar to this action by common law; that this was a queſtion, not between joint-tenants, or tenants in common, but tenants in gavelkind, who were male coparceners; that the true ſtate of the law as to coparceners was this, 1ſt, If both enter, there muſt be actual ouſter, to make a diſſeiſin. 2dly, If one enters generally, and takes the profits, this is no diſſeiſin. 3dly, If one enters *ſpecially*, as in the preſent caſe, claiming right to *the whole*, and taking the whole profits, this is a diſſeiſin; but after her death, the ſiſter may enter, unleſs barred by the ſtatute of limitations. 4thly, If, after a ſpecial entry, one by feoffment or fine, deſtroys the coparcenary, and takes back an eſtate in fee and dies, the entry of the ſiſter is barred. Here *R.* entered alone in 1704, took the whole profits, ſettled the eſtate in 1727, with the privity of *J.*; levied a fine, and died after ſixty-two years poſſeſſion. The entry of *J.* is therefore clearly barred, and he cannot maintain any ejectment. The court ſaid, that the ſtatute 2 *Anne*, made the lands of Roman Catholics

Catholics deſcend in gavelkind, that was its whole effect, and then the adverſe poſſeſſion of one gavelkind tenant, would not operate as the poſſeſſion of both. That was a qualified rule, and in the preſent caſe the acts of ownerſhip, fine, *&c.* made an actual ouſter, and the ſtatute of limitations operated as an extinguiſhment of the remedy of the one, and not as giving the eſtate to the other. *Davenport* v. *Tyrrell*, 1 *Black.* 675.

Parliament. [A]

(B) Who may ſit and have Privilege in the Houſe of Commons. 16 Vin. 188.

1. 15 GEO. 2. *c.* 22. Commiſſioners of revenue in *Ireland*; of the navy, clerks in the following offices; treaſury, auditors, tellers, or chancellor of exchequer's offices; admiralty, paymaſter of army or navy, ſecretaries of ſtate, ſalt, ſtamps, apples, wine-licence, hackney-coaches, hawkers and pedlars, or having office in *Minorca* or *Gibraltar*, except commiſſion officers in regiments, are excluded from being members of the houſe of commons.

2. 22 *Geo.* 3. *c.* 45. Every perſon who ſhall directly or indirectly, by himſelf or by any other to his uſe, hold any contract made with the commiſſioners of the treaſury, navy, or victualling-office, or the maſter-general, or board of ordinance, or any other perſon, for the account of the public ſervice; or ſhall in purſuance of any ſuch contract, furniſh any money to be remitted abroad, or any wares, or merchandize to be uſed in the ſervice of the public, ſhall be incapable of being elected, or ſitting, or voting in the houſe of commons during the time he ſhall hold ſuch contract.

3. 33 *Geo.* 2. *c.* 20. Members, before they vote or ſit in parliament ſhall deliver in a ſchedule of their qualifications according to 9 *Ann.* and ſwear to it, except eldeſt ſons of peers, or perſons qualified to be knights of a ſhire, members of univerſities, or *Scotch* members.

4. 14 *Geo.* 3. *c.* 58. repeals 1 *H.* 5. and ſo much of 8th, 10th, and 23d *H.* 6. as relates to reſidence of electors or elected.

5. 10 *Geo.* 3. *c.* 41. The ſpeaker, during receſs of parliament, may iſſue his warrant to the clerk of the crown, to make out a writ for electing a member in the room of one dead during receſs, on the death being certified under the hands of two members; he muſt give notice in the gazette, and not iſſue warrant till fourteen days after, nor unleſs the return of the deceaſed member was brought in fifteen days before the end of the ſeſſion preceding his death.

6. The ſpeaker is not to iſſue his warrant for a new election, unleſs the death was certified, ſo that the notice might be given 14 days before the meeting of parliament, nor where a petition was depending at the laſt prorogation or adjournment. 15 *Geo.* 3. *c.* 37. *ſ.* 1.

Sect. 2. He may iſſue his warrant on a member becoming a peer, in the ſame manner as if he were dead.

(B) As to Elections.

1. 18 GEO. 2. *c.* 18. Every elector, if required, ſhall ſwear he has a freehold of 40*s. per annum*, and what and where, and whether he has had it a year, or come to it by deſcent, marriage, marriage-ſettlement, deviſe, or promotion; that it was not granted on purpoſe to qualify; his place of abode; that he was twenty-one, and has not polled before.

Sect. 3 and 4. Elector muſt have been aſſeſſed to the land tax within twelve months before, except for chambers, *&c.* not uſually aſſeſſed; and duplicates of aſſeſſment ſhall be kept among the records of the quarter ſeſſions.

Sect. 5. Perſons not qualified, voting, or voting more than once, forfeit 40*l.*

Sect. 6. Taxes or rates are not to be deemed charges within the meaning of this act.

2. 31 *Geo.* 2. *c.* 14. Perſons holding their eſtates by copy of court-roll are not thereby entitled to vote for counties; if they vote they forfeit 50*l.* to any candidate for whom they did not vote.

3. 3 *Geo.* 3. *c.* 15. A freeman ſhall not vote, unleſs admitted twelve months before the firſt day of election, except entitled to freedom by birth, marriage, or ſervitude.

4. 3 *Geo.* 3. *c.* 24. requires annuities to be regiſtered with the clerk of the peace twelve months before the day of election.

5. 10 *Geo.* 3. *c.* 16. and 11 *Geo.* 3. *c.* 42. after the day appointed to conſider a petition, the firſt time there are one hundred members preſent, the names of forty-nine preſent are to be drawn out of the whole houſe; each party names one not drawn; each party then ſtrikes out alternately one of the forty-nine till they reduce them to fifteen; theſe fifteen make a committee to determine the election; thirteen muſt be preſent. None can vote who have not been preſent every ſitting; they have power to ſend for perſons, papers, *&c.* and to examine on oath. Notice is to be given to all parties; if there were more than two parties intereſted, the thirteen ballotted members nominate the two nominees. This act is made perpetual by 14 *Geo.* 3. *c.* 15.

6. In an action on the ſtatute for bribery at an election, the plaintiff had a verdict; two objections were taken: 1ſt, That the perſon bribed did not vote according to the bribe; but the court held, that the offence of the perſon giving the bribe was complete, although the other ſhould afterwards repent. 2dly, It was objected

jected that the declaration was not proved, as the perſon bribed had given a note to return the money if he did not vote according to the bribe, and that it was therefore a loan and not a gift as ſtated in the declaration; but the court held it to be clearly a bribery by gift under colour of a loan, and gave judgment for the plaintiff. *Sulſton* v. *Norton*, 1 *Bl. Rep.* 317.

7. It was ruled, that bribery at elections was puniſhable at common law, and continued to be ſo, notwithſtanding the ſtat. 2 *Geo.* 2; but that ſince that ſtatute, on account of the heavy penalties therein, the court ought to be cautious of granting an information for the offence. *Rex* v. *Pitt*, 1 *Bl. Rep.* 380.

8. Action on the ſtatute of bribery, and verdict for the plaintiff. The counſel for the defendant took three objections. 1ſt, That the declaration ſtated the party to have been bribed to vote for *L.* and Lord *E.* whereas the evidence was, that it ſhould be for *L. and his friend.* 2d, That the declaration ſtated Lord *E.* and *C.* to have been candidates at the election, whereas no evidence was given to prove that averment. 3d, That it ſtated the perſons bribed to have had a right to vote, of which no evidence was given, except the fact of their having voted. Theſe exceptions were overruled. *Combe qui tam* v. *Pitt*, 1 *Bl. Rep.* 523. S. P. (As to the laſt point,) *Rigg* v. *Gugenven*, 2 *Wilſ.* 395.

9. The defendant being bribed at an election, in order to indemnify himſelf, (according to the 2 *Geo.* 2.) made affidavit of the ſame offence againſt the perſon who bribed him; upon which one of the candidates brought an action againſt the perſon giving the bribe, and another perſon brought the action againſt the defendant. The queſtion was, whether he was indemnified or not? It was objected that the defendant was not indemnified, not having been plaintiff in the other action; but the court held the affidavit a ſufficient diſcovery. The next objection was, that there was not due dilligence uſed in that proſecution, as that the verdict in the preſent action was prior to it; but this was overruled, the want of diligence appearing to have been accidental. Laſtly, It was objected, that the conviction in this action being prior to the other, the indemnity could not operate againſt it: but the court held, that although the conviction muſt follow, yet the indemnity ariſes from the diſcovery. Execution was therefore ſtayed by rule of court. *Sutton* v. *Biſhop*, 1 *Bl. Rep.* 665.

10. It was ruled, that an action on the 7 & 8 *W.* 3. for a falſe return was within the ſtatute of jeofails; that ſtatute being remedial; and that ſuch action lay, although there was no reſolution of the Houſe of Commons aſcertaining the right of election. *Wynne, Bart.* v. *Middleton*, 1 *Wilſ.* 125.

(C) Extent of Privilege.

A Writ of *habeas corpus* being directed to the Earl of *Ferrers*; before an attachment was moved for the Houſe of Lords was petitioned for leave to proceed againſt him; whereupon that houſe came to a reſolution, *that no peer or lord of parliament hath privilege of peerage or parliament againſt being compelled by proceſs of* Weſtminſter-Hall *to pay obedience to a writ of privilege directed to him*; and therefore an attachment iſſued againſt the earl. *Rex* v. *Earl of Ferrers*, 1 *Burr.* 632.

(D) Power of impriſoning, and Effect of Prorogations.

WHERE to a *habeas corpus* the return was, that the priſoner was in cuſtody under the warrant of the Speaker of the Houſe of Commons, for having committed the meſſenger of the houſe for execution of their warrant; the court held the return good; for the Houſe of Commons is the only judge of its privileges. *The Caſe of the Mayor of London*, 3 *Wilſ.* 188.

Partition.

16 Vin. 232

(R) Writ of Partition. Proceedings therein.

1. CHANCERY entertains ſuits for partition though a proceeding at common law, and though no expreſs authority be given by the ſtat. to that court, as to joint-tenants. 2 *Veſ. jun.* 124.

2. Bill for partition is a matter of right, and there is no inſtance of not ſucceeding in it, but where there is not proof of title in plaintiff. *Ambler*, 236.

3. The ſtrongeſt arguments of inconveniency will not prevail, though the plaintiff was entitled to 3 or 400 acres, and the defendant to four or five acres only, and though the defendant would rather have given up his part than be at the expence of a partition, yet it was agreed that it ſhould be at the expence of both parties. *Ibid.* 237.

4. And the difficulty, however great, of making partition, is no objection to making a decree for one. *Ibid.* 589.

5. Where an infant is one of the parties, whether plaintiff or defendant, he has time to ſhew cauſe againſt the decree, and therefore

therefore the court will order the other parties' conveyance to be reſpited till the ſame time. *Ambler*, 197.

6. A commiſſion to ſet out lands ſhall not be granted, if defendant denies plaintiff's title, and ſays he has no lands in his poſſeſſion belonging to plaintiff. *Biſhop of Ely* v. *Kenrick*, *M.* 1732. *Bunb.* 322.

7. If there is a miſtake (as in the date of the year when a thing was done) in the return of a commiſſion, the court, on motion, will order it to be amended by the commiſſioners. *Rouſe* v. *Barker*, *Bunb.* 251.

8. No partition of land can now be made without deed. *Johnſon* v. *Wilſon*, *Willes*, 248.

9. A new compulſory mode of partition has ſprung up, and is now fully eſtabliſhed, namely, by a decree of Chancery exerciſing its *equitable* juriſdiction on a bill filed, praying for a partition; in which caſe it is uſual for the court to iſſue a commiſſion for the purpoſe to various perſons, who proceed without a jury. *Vide Hargrave's & B.'s edit. of Co. Litt. lib.* 3. *ſect.* 248. (*note* 23.)

10. A power to *ſell or exchange* extends to making a partition. *Abel* v. *Heathcote*, 4 *Brown's Reports in Chan.* 278.

Pleadings, and what ſhall be recovered.

16 Vin. 239.

1. BY ſtat. 8 & 9 *Will.* 3. *c.* 31. after proceſs of *pone* or *attachment* returned on a writ of partition, affidavit being made by any credible perſon of due notice given of the ſaid writ of partition to the tenant, *&c.*, and a copy thereof left with the occupier, *&c.* at leaſt 40 days before the day of the return of the ſaid *pone* or *attachment*, if the tenant, *&c.* do not, within 15 days after the return of ſuch writ of *pone*, *&c.* cauſe an appearance to be entered in the court where the proceſs is returnable, then, in default of appearance, the court may proceed to examine the demandant's title and quantity of his part to purpart, and award a writ of partition accordingly. *Vide* 2 *Bl. Rep.* 1134.

2. And after ſuch writ executed, upon eight days' notice to the tenant of the land, and returned, judgment final ſhall be given, which ſhall conclude all perſons after notice, though not named in the proceeding, and though the title of the tenant be not truly ſet forth.

3. Provided if any within a year after judgment, or if infant, *coverт*, *non-ſane*, or out of the realm, within a year after inability removed, by motion ſhew a probable bar, or that the plaintiff had not title to ſo much, the court may admit him to plead, *&c.*, or if he ſhews an inequality of partition, the court may award a new partition.

4. After return of the partition by the ſheriff, there ſhall be final judgment *quod partitio prædicta ſtabilis in perpetuum teneat.* 2 *Bl. Rep.* 1159.

16 Vin. 241.

(Z) Equity. *Decreed* in Equity, and how.

1. MARY and *Susan Jackson*, the daughters and co-heirs of *James Jackson*, being seised in fee of certain lands, the former married *Thomas Ingram*, and the latter *Wm. Rittle*, and by a mutual agreement of their husbands in 1686, a partition was made of the said premises between themselves and the heirs of *Mary* and *Susan*; the husbands are both dead, the bill is against *Susan Rittle* to confirm the division of the said estates: the agreement of the husbands cannot bind the inheritance of the wives. 1 *Atk.* 541. *Nov.* 1739. *Ireland* v. *Rittle.*

2. A parol agreement for equality of partition of a long standing by persons who had a right to contract, and accordingly put in execution, will be established in this court. *Ibid.* 542.

3. If a joint-tenant, upon equality of partition, thinks proper to accept of a contingent uncertain advantage, where one moiety of the land is of superior value to the other, it will not vacate the agreement. *Ibid.*

4. On a bill for a partition between two joint-tenants, the plaintiff must shew a title in himself, and not allege generally, that he is in possession of a moiety. 2 *Atk.* 380. *July* 1742. *Cartwright* v. *Pultney.*

5. Two tenants in common in tail of a copyhold estate agree to make partition; each surrenders the part allotted to the other: held, the entail was only as to a moiety. *Ambl.* 368. *Feb.* 1759. *Oakley* v. *Smith.*

6. Partition between an adult and an infant, as the infant has time to shew cause till twenty-one, the conveyance from the adult ordered to be respited till the same time. *Ambl.* 197. *Nov.* 1743. *Tuckfield* v. *Buller.*

7. Bill for partition is matter of right and of course. *Ambl.* 236. *July* 1754. *Parker* v. *Gerard.*

8. The difficulty in making a partition is no objection to the making a decree for a partition. *Ambl.* 589. *Oct.* 1750. *Warner* v. *Bynes.*

9. Partition is a proceeding at common law, but Chancery entertains suits for it. 2 *Ves. jun.* 124.

10. On a bill for partition, the costs of executing the commission, and of all necessary proceedings in the cause, must be defrayed by the parties in proportion to their interests. 2 *Ves. jun.* 568. 1795. *Calmady* v. *Calmady.*

Partners.

Who ſhall be; and their Power over the joint Effects. 16 Vin. 242.

1. THE true criterion of determining (when money is advanced to a trader) whether it conſtitutes a partnerſhip or a loan, is to conſider whether the profit or premium is certain, and defined, or caſual, and depending upon the accidents of trade. *Per De Grey* C. J. and *Blackſtone* J. *Grace* v. *Smith*. *C. B.* 2 *Black.* 1000.

2. *S.* and *R.* entered into a partnerſhip for ſeven years, but ſoon afterwards agreed to diſſolve it. The articles were not cancelled, but the diſſolution was notorious. It was agreed at the time of the diſſolution, that *S.*, who retired from the buſineſs, ſhould let part of his ſhare remain in the hands of *R.* for ſeven years, to receive 5 *per cent.* intereſt, and alſo an annuity for that time, for all which *R.* gave his bond to *S.* This is not a continuance of the partnerſhip, for *S.* has no ſpecific lien upon the profits of the trade, and cannot be conſidered as having a ſhare in them. *Grace* v. *Smith*, *C. B.* 2 *Black.* 998.

3. But where an agreement to diſſolve a partnerſhip recited, "That *B.* being deſirous to have the profits of the trade to himſelf, and *P.* being deſirous to relinquiſh his right to the trade and profits, it was agreed, that *B.* ſhould give *P.* a bond for the ſum he brought into the trade, with intereſt at 5 *per cent.*; and further that he ſhould pay *P.* 200*l.* *per ann.* for ſix years, as in lieu of the profits of the trade, and *B.* covenanted that *P.* ſhould have free liberty to inſpect his books." Lord *Mansfield* held, that *P.* was a ſecret partner. For this was a device to make more than legal intereſt of the money, and if it was not a partnerſhip it was a crime, and it ſhall not lie in *P.*'s mouth to ſay it is uſury. *Bloxham and Fourdrinier* v. *Pell and Brook*, *Sitt. Mid. after Hil.* 1775. Cited *Ib.*

4. If one of two partners become bankrupt, the ſolvent partner may, if for a valuable conſideration, and without fraud, diſpoſe of the partnerſhip effects, and if he afterwards fail, the aſſignees, under a joint commiſſion againſt both, cannot maintain trover againſt the *bonâ fide* vendee of ſuch partnerſhip effects. *Fox et al.* v. *Hanbury et al.*, *Cowp.* 445. *Vide* alſo argument of *Buller* J. in *Salamons* v. *Niſſen et al.*, 2 *Term Rep.* 682.

5. A number of perſons employed a broker to purchaſe a lot of tea at the *Eaſt India* company's ſale, of which they, together

with himſelf, were to have ſeparate ſhares, the lots being too large for one dealer. The company gave the broker *a warrant* for the delivery of the tea on payment being made. The plaintiffs advanced a ſum of money on this warrant and the broker's note, who afterwards became a bankrupt. Theſe employers of the broker are not to be conſidered as partners, or liable to the plaintiffs for more than the proportion upon their ſeveral ſpecific ſhares of the lot. *Howe* v. *Dawes et al.*, *Doug.* 356.

6. An act of bankruptcy by one partner is, to many purpoſes, a diſſolution of the partnerſhip by virtue of the relation in the ſtatutes, which avoids all the acts of a bankrupt from the day of the bankruptcy, and from the neceſſity of the thing, all his property being veſted in the aſſignees, who cannot carry on a trade. *Cooke's Bankrupt Laws*, 554. *Hague* v. *Rolleſton*, 4 *Burr.* 2176. *Smith* v. *De Silva*, *Cowp.* 471.

16 Vin. 242.

(A) How liable to Creditors.

1. IF an action be brought againſt one partner only upon a partnerſhip account, he cannot give in evidence that there is another partner who is not joined in the action, but muſt plead it in abatement. *Rice* v. *Shute*, 5 *Burr.* 2611. 2 *Black. Rep.* 695. S. C. *Abbot* v. *Smith*, 2 *Black Rep.* 947. S. P.

2. If a bill be brought againſt one partner for a joint demand, and the other is not amenable to the court, being out of the kingdom, the partner before the court ſhall pay the whole. *Darwent* v. *Walton*, 2 *Atk.* 510.

3. If a creditor of one partner take out execution againſt the partnerſhip effects, he can only have the undivided ſhare of his debtor; and muſt take it in the ſame manner that the debtor himſelf had it, and ſubject to the rights of the other partner. Cited *per* Lord *Mansfield* in *Fox* v. *Hanbury*, *Cowp.* 449. as laid down by Lord *Hardwicke* in *Ship* v. *Harwood*, *in Chan. 6th July* 1747. *Vide Weſt* v. *Skip*, 1 *Veſ.* 239. S. C.

4. The aſſignees under a commiſſion of bankruptcy, muſt be in the ſame ſtate. *Fox* v. *Hanbury*, *Cowp.* 449.

5. Where on an execution againſt one of two partners, the partnerſhip goods were taken and ſold, the court, on motion, directed that it ſhould be referred to the Maſter to take an account of the ſhare of the partnerſhip effects to which the other partner was entitled, and that the ſheriff ſhould pay a part of the money levied, equal to the amount of ſuch ſhare, to his aſſignees, he being a bankrupt. *Eddie* v. *Davidſon*, *B. R. Dougl.* 627.

6. Acts ſubſequent to the time of delivering goods on a contract may be admitted as evidence to ſhew that the goods were delivered on a partnerſhip account. But if it clearly appear that no partnerſhip exiſted at the time of the contract, no ſubſequent act by any perſon who has afterwards become a partner, (not even an acknowledgment that he is liable, or his accepting a bill of

of exchange drawn on them as partners for the very goods,) ſhall make him liable in an action for goods ſold and delivered; though he will be liable in an action on the bill of exchange. *Saville* v. *Robertſon and Hutchinſon*, 4 *Term Rep.* 720.

7. If partners diſſolve their partnerſhip, they who deal with either without notice of ſuch diſſolution, have a right againſt both. *Per* Lord *Mansfield* in *Fox* v. *Hanbury*, *Cowp.* 449.

8. If two are partners as *attornies* and *conveyancers*, and one receives money to be laid out on mortgage, the other is liable for the amount, though his partner gave a ſeparate receipt for it in his own name, and no procuration money was paid for their trouble. *Willet* v. *Chambers*, *Cowp.* 814.

9. *A.* and *B.*, ſhip agents at different ports, enter into an agreement to ſhare in certain proportions the profits of their reſpective commiſſions, and the diſcount on tradeſmen's bills employed by them in repairing the ſhips conſigned to them; and the agreement provides, that neither ſhall be anſwerable for the acts or loſſes of the other, but each for his own. Held in *C. B.* that notwithſtanding this they become liable as partners to all perſons with whom either contracts as ſuch agent. *Waugh* v. *Carver and others*, 2 *H. Black.* 235.

10. If two joint-traders owe a partnerſhip debt, and one of the partners gives a bond as a collateral ſecurity for payment of this debt; here the joint-debt may be ſued for by the partnerſhip creditor, who may likewiſe ſue the bond given by one of the traders. 3 *P. Wms.* 408. *Hil.* 1735. *Ex parte Rowlandſon.*

11. Where one partner is out of the kingdom, the partner before the court ſhall pay the whole of a joint-demand. 2 *Atk.* 510. *Feb.* 1742. *Darwent* v. *Walton.*

And ſervice of ſubpœna upon one partner here deemed good ſervice upon his partner in France. Bunb. 107. 1722. Lady Carrington v. Cantillon.

12. Partners continue joint tenants in the ſtock, notwithſtanding it changes in the courſe of trade, and are ſeized *per my and per tout*, and on account each muſt have all allowances before a judgment creditor of the other can come on the other's ſhare. 1 *Veſ.* 239. 1749. *Weſt* v. *Skip.*

13. Partnerſhip effects firſt applied to pay partnerſhip debts. *Ibid.* 1 *Veſ.* 456.

14. Judgment in an action againſt a ſurviving partner remains a partnerſhip debt ſtill. 2 *Veſ.* 265. *April* 1751. *Jacomb* v. *Harwood.*

15. A joint-creditor, by ſimple contract may go againſt the affects of a deceaſed partner, but cannot, before the account, retain ſeparate property of that partner in his poſſeſſion. 3 *Veſ. jun.* 565. *Dec.* 1797 *Stevenſon* v. *Chiſwell.*

16. Though one of the partners is an infant, an action muſt be brought againſt all three. 4 *Veſ. jun.* *Aug.* 1798. *Ex parte Henderſon.*

17. A ſeparate creditor of a partner has no right againſt the joint property farther than the ſeparate intereſt of that partner, *viz.* his ſhare upon a diviſion of the ſurplus, ſubject to the accounts of the partnerſhip; therefore joint-property of an inſolvent partnerſhip, taken in execution for a ſeparate debt, cannot be held againſt joint creditors. 4 *Veſ. jun.* 396. *Jan.* 1799. *Field* v. ———.

18. Aſſignee, executor, or ſeparate creditor, coming in the right of one partner againſt the joint property, comes into nothing more than the intereſt, ſubject to an account between the partnerſhip and the partner, and therefore to the joint debts; aſſignee under a ſeparate commiſſion of bankruptcy has only the ſame right to ſtand in the place of the bankrupt by the common law, not under the bankrupt laws. *Ibid.* 397.

19. The court expreſſed great doubt whether the ſtock in trade, being in the poſſeſſion of the bankrupt ſolely, the claim of partnerſhip could be ſuſtained upon the ſtat. 21 *J.* 1. *c.* 19. *ſ.* 10, 11. 4 *Veſ. jun.* 756. *July* 1799. *Binford* v. *Dommett.*

(B) Diſputes between the Partners and their Debtors.

1. AN action cannot be maintained by ſeveral partners for brandy ſold by one of them living in *Guernſey*, and put into half ankers, and ready ſlung for the purpoſe of ſmuggling, though the other partners, who reſided in *England*, knew nothing of the ſale, for it is a contract by ſubjects of this country, made in contravention of the laws, and muſt be conſidered in the ſame light as if all the partners lived in *England*. *Biggs & al.* v. *Lawrence*, 3 *Term Rep.* 454.

2. The plaintiffs, together with *A.* and *B.* being owners of one privateer, and the defendant of another, a prize was taken, condemned, and ſhared by agreement between them; afterwards the ſentence of condemnation was reverſed, and reſtitution awarded with coſts, which were paid ſolely by the plaintiffs; *A.* and *B.* having in the meantime become bankrupts. An action cannot be brought by the plaintiffs alone for a moiety of the reſtitution money and of the coſts, becauſe it was either a partnerſhip tranſaction, when *A.* and *B.* ought to be joined; or not, when ſeparate actions ſhould be brought by each of the perſons paying. *Graham et al.* v. *Robertſon*, *B. R.* 2 *Term Rep.* 282.

3. Where money is owing to two partners, and after the death of one it is paid to a third perſon, the ſurviving partner may maintain an action for money had and received in his own right, and not as ſurvivor. *Smith* v. *Barrow*, 2 *Term Rep.* 476.

(C) One dies. Diſputes betweeen the Executor or Adminiſtrator of the Deceaſed and the Survivor, &c.

1. IF one partner dies, the debts and effects ſurvive, but yet the ſurvivor is conſidered in equity as a truſtee for the repreſentatives of the deceaſed, who have a ſpecific lien upon the ſtock; but ſuch lien may be loſt by *laches*, or conſent to leave the goods in the ſurvivor's power (*a*), when, if he becomes bankrupt, the ſpecific lien is loſt under 21 *J.* 1. *c.* 19. *Per Hardwicke* C. *Weſt* v. *Skip*, 1 *Veſ.* 242. *Ib.* 456.

(*a*) *Vide* Ryal v. Rowles, 1 Atk. 165. 1 Veſ. 348.

2. An agreement was entered into between the plaintiffs and one *H.* impowering him to contract for the building a ſhip for them, and for the fitting her out, &c., with a covenant that the ſubſcribers, *i. e.* the plaintiffs, and *H.* ſhould pay proportionate ſhares, according to the ſeveral parts of the money, and all the charges and diſburſements in equipping, &c. *H.* dying inteſtate, a bill was brought againſt his repreſentatives, by the part-owners, that they ſhould have a ſpecific lien upon what ſhould be due to *H.* for his ſhare, for the money they had paid to the tradeſmen for fitting out the ſhip, &c. Lord *Hardwicke* conſidering this to be a partnerſhip concern decreed accordingly, ſaying that the court always laboured to decree a partnerſhip to prevent other creditors from running away with that which the plaintiffs had expended. *Doddington* v. *Hallet*, 1 *Veſ.* 497.

3. Where *A.* and *B.* enter into articles of partnerſhip, and it is provided by them, that notwithſtanding the death of *A.* the trade ſhall be carried on by his repreſentatives jointly with *B.*; if *B.* die, his repreſentatives ſhall not be entitled to carry it on. At the Rolls, *Oct.* 30, 1750. *Pearce* v. *Chamberlain*, 2 *Veſ.* 33.

4. On a bill for ſpecific performance of an agreement to let the plaintiff into trade, his Honor ſaid, he never knew an inſtance that the court decreed an account of the profits of the trade from the time the plaintiff ought to be let in. Where a truſtee has money of an infant's to lay out in the funds for the infant's benefit, and lays it out in trade, which produces 10*l. per cent.* the court will give that infant an option, either to have intereſt for the money or the profits of the trade: but that is a very ſingular inſtance and the only one of the kind. *Anonymous*, at the Rolls, *July* 9, 1755. 2 *Veſ.* 629.

5. The court would not decree performance of ſuch an agreement, and then decree damages for the delay in not letting in the plaintiff ſooner, for that the plaintiff might have had, if he had uſed his remedy at law. *Id. Ib.*

(D) One dies (or becomes Bankrupt.) Diſputes between Creditors and the Survivor, &c.

1. *A.* and *B.* partners as bankers, gave a note to *C.* for a ſum of money. Afterwards *A.* dying and leaving *B.* one of his executors, *C.* called upon *B.* for a further ſecurity than the note, and judgment was entered up in an action againſt him, not as executor of *A.* but as a ſurviving partner for a partnerſhip debt. This is an extinguiſhment of the demand on the note, but it continues a partnerſhip debt, only bettered by the ſecurity. *Jacomb* v. *Harwood*, at the Rolls, *Per* Sir *J. Strange*. 2 *Veſ.* 265.

See 1 Atk. 227. and *Ex parte* Barrell, 22d July 1783, Cooke's B. L. 556.

2. One of three partners in a ſhip and cargo, the coſt and outfit of which was 4568*l.*, pays only 410*l.* in part of his third ſhare, and gives his notes for the remainder; but before they become due is declared a bankrupt. The other partners cannot, by voluntarily diſcharging the notes, ſtand in his place for any ſhare of the profits, but the aſſignees are entitled to a full third, both of the profits of the adventure and the value of the ſhip. For all the expence being incurred prior to the bankruptcy, if the voyage had proved a loſing one the bankrupt would have been liable for the whole in proportion to the other owners; and as he had thus a right to a third of the profits at the time of the bankruptcy, his inſolvency does not vary the right. The taking up the notes was the agreement of third perſons, without the privity of the bankrupt or his aſſignees, and cannot vary their right. *Smith* v. *De Silva*, *B. R. Coup.* 469.

The reporter ſtates that Lord *Aſhley*, C. when he directed this iſſue, was extremely clear in the ſame opinion.

3. *A.* and *B.* being partners, *A.* receives, as aſſignee under a commiſſion of bankrupt, 2563*l.* which, with *B.*'s privity, he applied in their joint trade, and entered on their joint-account. The partnerſhip is afterwards diſſolved, and the partnerſhip effects are aſſigned over to *A.* who took upon him the debts. Afterwards a joint-commiſſion iſſued againſt both of them, and new aſſignees were choſen in that commiſſion, under which *A.* received the money. It was held in *B. R.* upon an iſſue out of Chancery, that this was no payment by *B.* ſo as to diſcharge him of the claim by the new aſſignees to the truſt-money, but that both were liable to make it good. *Smith and others, Aſſignees of Lewis and Potter* v. *R. and T. Jamieſon*, 5 *Term Rep.* 601.

4. Bankers, upon a depoſit of money with them, give notes bearing intereſt; the partnerſhip was diſſolved; one of the partners ſoon afterwards died, and his creditors were called by public advertiſement. Another partnerſhip was formed by the ſurvivors and others, who iſſued notes of the former partnerſhip, and paid the intereſt of the depoſit notes, for near two years, when they failed. The aſſets of the deceaſed partner held diſcharged. 3 *Veſ. jun.* 277. 1796. *Daniel* v. *Croſs*.

(E) *Inter ſe.*

1. PARTNERS are joint-tenants in the ſtock and all effects; and they are not only ſo in that particular ſtock in being at the time of entering into the partnerſhip, but they are to continue ſo throughout, whatever changes may happen in the courſe of the trade. And being ſeiſed *per my et per tout*, when an account is to be taken each is entitled to be allowed againſt the other every thing he has advanced, or brought in as a partnerſhip tranſaction, and to charge the other in the account with what the other has not brought in, or has taken out more than he ought; and nothing is to be conſidered as his ſhare, but his proportion of the reſidue on balance of the account. *Per* Lord *Hardwicke* C. in *Weſt* v. *Skip*, 1 *Veſ.* 242. *Ib.* 499. S. P. *Vide* alſo *Fox* v. *Hanbury*, *Cowp.* 445, *Smith* v. *De Silva*, *Ib.* 471. *Goſs* v. *Dufreſney*, *Davies*, 371. *Cooke's Bank. Laws*, 552.

2. A partner has a ſpecific lien not only on the original ſtock, but alſo on every thing coming in lieu during the continuance or after the determination of the partnerſhip. *Id. ib.* and *Cowp.* 449. *Per* Lord *Manſfield.*

3. The partnerſhip effects muſt be applied to pay the partnerſhip debts before any other partner can claim any thing out of them, either for his ſhare or debt. *Id. ib.* 456.

4. Three perſons ſeiſed of land called *B.* in fee, entered into partnerſhip for 21 years, erected mills thereon, and declared the uſes of the land to be to themſelves in fee as tenants in common. Afterwards they entered into another partnerſhip by deed for 21 years, taking in four new partners, and in the partnerſhip deed there was a covenant from the three original partners to ſtand ſeiſed of the land in truſt for the co-partnerſhip in the proportions in which they were reſpectively intereſted therein, and a proviſo, that in caſe any of them wiſhed to diſpoſe of their ſhare, that they might do ſo, giving notice to the other partners, in order that they might have an opportunity of purchaſing. The partnerſhip term being expired, they went on afterwards without any new agreement. One of the partners being dead, and the partnerſhip diſſolved, Lord *Thurlow* C. held, that this agreement was not ſufficient to alter the nature of the property from real into perſonal, ſo as to make the deceaſed partner's ſhare of it diſtributable to his repreſentative, according to the rules of law regulating the latter. *Thornton* v. *Dixon*, 3 *Brown*, 199.

5. One partner may maintain an action for money had and received againſt the other partner for money received to the ſeparate uſe of the former, and wrongfully carried to the partnerſhip account. *Smith* v. *Barrow*, *B. R.* 2 *Term Rep.* 476.

6. One partner cannot recover a ſum of money received by the other, unleſs on a balance ſtruck, that ſum is found due to him alone. *Per Buller* J. *Ib.*

7. One partner may be creditor of another, and prove his debt under a ſeparate commiſſion. *Ex parte Drake.* Cited 1 *Atk.* 225.

8. Where two enter into articles of partnerſhip for ſeven years, in which is a covenant to account yearly, and to adjuſt and make a final ſettlement at the expiration of the partnerſhip, and they diſſolve the partnerſhip before the ſeven years are expired, and account together, and ſtrike a balance, which is in favour of the plaintiff, *including ſeveral items* not connected with the partnerſhip, and the defendant promiſes to pay it, an action of *aſſumpſit* lies on ſuch expreſs promiſe, and the plaintiff need not bring covenant upon the articles. *Faſter* v. *Allanſon*, 2 *Term Rep.* 479.

So, though no other articles had been introduced into the account but thoſe relating to the partnerſhip. *Vide* Moravia v Levy. Cor. Buller J. at G. Hall, Mid. 1786.

9. One part owner of a ſhip, freighted it, although the other expreſsly diſſented; the ſhip and cargo were loſt, and held by his Honor, that as the party diſſenting ſhould not be entitled to any advantage from the freight, ſo he ſhould not be anſwerable for the loſs. And he ſaid that the printed report of *Strelly* v. *Winſon*, 1 *Vern.* 297. which is *contrà*, was not right, but differed greatly from the decree. *Horn* v. *Gilpin*, at the Rolls, 15 *Feb.* 1755. *Ambl.* 255.

10. In a cauſe for an account of a partnerſhip, both parties being dead, a receiver ſhall be appointed; but it is otheriſe where one partner ſurvives, for there was a confidence between the parties. *Philips* v. *Atkinſon*, at the Rolls, 13 *Nov.* 1787. 2 *Brown*, 272.

11. Where money to fit out privateers was raiſed by ſhares, and 30 ſhares remained undiſpoſed of, and a prize was taken, Lord *Hardwicke* C. decreed the undiſpoſed ſhares belonged to the managers, (whether they purchaſed them after the capture or not,) and that they were not to be divided among the other owners; for in caſe of loſs they would not have been liable for them. *Blunt* v. *Cumyns*, 2 *Veſ.* 331.

12. In all ſea adventures the acts of a majority of the partners binds the whole. 1 *Bro. Par. Ca.* 90. 1704. *Viſcounteſs Dowager Falkland and others* v. *Lord Cheney.*

13. Three perſons agree to become partners, and equally contribute to raiſe a joint-ſtock. The buſineſs was carried on by one of them only, and no articles were executed, becauſe there were reaſons for keeping the partnerſhip ſecret. Held, that a draft of articles, together with a ſtated account, and the payment of money by the acting partner to the others, were ſufficient evidence of the partnerſhip, whereon to ground a decree for an account. 1 *Bro. Par. Ca.* 1707. *Worts* v. *Pern.*

14. One of ſeveral partners, who is treaſurer for the whole, enters into a contract with *A.* and afterwards failing, his eſtate is veſted in truſtees. Though the contract with *A.* concerns the partnerſhip buſineſs, yet he is not entitled to any ſatisfaction out of the treaſurer's ſhare of the partnerſhip effects, but muſt come in

in equally with the reſt of his creditors; the money due to *A.* upon the contract not being for wages. 1 *Bro. Par. Ca.* 384. 1713. *Ball* v. *Lord Viſcount Laneſborough.*

15. *A.* agreed to take his nephew into partnerſhip with him, and with his own hand made the following entry in a new ſet of books, *&c. viz.* "*Debter to account* of ſtock in trade, for ſo much ſtock "I put into the company's trade with my nephew *H.*, 10,000*l.*" The name of *H.* was for ſome time uſed as partner in the trade, but no articles were ever entered into between him and his uncle, nor was any part of the ſtock or profits received by or made good to him. *H.* is not entitled to an account. 1 *Bro. Par. Ca.* 432. 1714. *Jacobſon* v. *Henekenens.*

16. *A.*, on behalf of himſelf and partners, enters into a contract with *B.*, but the name of *A.* only was uſed in the contract. *A.*'s partners are liable to him. 3 *Bro. Par. Ca.* 127. 1725. *Brown* v. *Gibbins.*

17. If a partner aſſigns his ſhare for a valuable conſideration to a perſon not having notice of the partnerſhip, that is a ſtrong caſe for the purchaſer, becauſe he gains the legal intereſt; but it depends on the courſe of trade, which governs in mercantile matters. 1 *Veſ.* 499. 1750. *Doddington* v. *Hallet.*

18. One partner, notwithſtanding a temporary diſorder, conſidered as partner. 2 *Veſ.* 35. 1750. *Pearce* v. *Chamberlain.*

19. On decreeing performance of an agreement to let into a trade, an account back of the profits will not be decreed; but an infant, whoſe truſt-money is laid out in trade, has an option. 2 *Veſ.* 629. 1755. *Anon.*

20. One part owner of a ſhip freights it contrary to the expreſs diſſent of the other, the ſhip and cargo are loſt, the loſs falls wholly on the part owner who freights. *Ambl.* 255. *Feb.* 1755. *Hern* v. *Gilpin.*

21. Though a co-partneſhip agreement may alter the nature of real eſtates, yet it muſt be expreſs ſo to do. 3 *Bro. Ch. Rep.* 199. *Jan.* 1791. *Thornton* v. *Dixon.*

22. An account of a partnerſhip eſtate, and of monies paid to one of the partners during the partnerſhip, directed at the diſtance of four years after its diſſolution, under circumſtances, ſhewing that one partner retired from a conviction that the partnerſhip was inſolvent. 4 *Bro. Ch. Rep.* 422. *Aug.* 1793. *Anderſon* v. *Maltby.*

23. Bill by a partner under a parol agreement charging miſconduct in the other partner, and praying a diſſolution, account, and injunction from executing ſecurities in the name of the firm: demurrer to the prayer for a diſſolution, becauſe there was no writing between them, overruled. 3 *Veſ. jun.* 74. *March* 1796. *Maſter* v. *Kirton.*

24. Partners bound by an inſtrument executed by one in the preſence of the others. 3 *Veſ. jun.* 578. *Jan.* 1798. *Burn* v. *Burn.*

25. The

25. The good-will of a trade carried on in partnerſhip without articles ſurvives, and is not partnerſhip ſtock; profits accrued after the death of one partner are joint-property. 5 *Veſ. jun.* 539. *July* 1800. *Hammond* v. *Douglas.*

26. The court cannot make an allowance to one partner for the expence of entertaining the cuſtomers; the accounts having been annually balanced without ſuch an item is concluſive. 1 *Anſt.* 94. 33 *G.* 3. *Thornton* v. *Procter.*

27. The court will not appoint a receiver of a ſubſiſting partnerſhip trade, unleſs on the groſſeſt abuſes of ſome of the partners. 2 *Anſt.* 453. 34 *G.* 3. *Oliver* v. *Hamilton.*

Party.

16 Vin. 247. (A) Parties *in Suits in Equity.* Of the Neceſſity of having proper Parties; and who ſhall be in general.

1. WHERE ſeveral perſons have claims upon an eſtate, in the different characters of purchaſers, leſſees, and mortgagees, the perſon claiming the ultimate beneficial intereſt may make them all parties to his bill. 3 *Bro. Par. Ca.* 122. 1725. *Edgworth* v. *Swift.*

2. On a bill for an account of fees and to eſtabliſh a right, all perſons who have any pretence to the right muſt be before the court, for they will be bound by a decree here; otherwiſe as to a judgment at law, which will not bind the right of a third perſon. 2 *Atk.* 296. 1742. *Pawlet* v. *Biſhop of Lincoln.*

3. Where the juriſdiction is drawn out of a court of law, all the parties muſt be before the court, who are neceſſary to make the determination complete and to quiet the queſtion. 2 *Atk.* 515. 1742. *Poore* v. *Clerk.*

4. A few creditors may ſue for themſelves and the reſt, and the ſuit abates not by the death of one of them. 2 *Veſ.* 312. 1751. *Leigh* v. *Thomas.*

5. Part of a ſhip's crew appoint two to be agents; on a bill to account the reſt muſt be parties. 2 *Veſ.* 312. 1751. *Leigh* v. *Thomas.*

6. Agents muſt ſue in the names of their principals. 2 *Veſ.* 313. *Ibid.*

7. Bill for a moiety; the other moiety was given to *A.* for life, and upon her death, to ſuch perſons as ſhe ſhould appoint, in default

fault of appointment to other perſons: thoſe perſons muſt be parties. 3 *Bro. Ch. Rep.* 229. 1791. *Sherrif v. Birch.*

8. So to a bill by *ſome* of the reſiduary legatees, *all* muſt be parties. 3 *Bro. Ch. Rep.* 365. 1791. *Parſons* v. *Neville.*

(B) Parties to Bills in Chancery. Who.

16 Vin. 249.

Adminiſtrators.

1. BILL by plaintiff *Orlando Humphreys*, againſt his father Sir *Wm. Humphreys*, for an account of the perſonal eſtate of Col. *Lancaſhire*, deceaſed, who by his will gave 10,000*l.* to his wife *Helen* and daughter *Helen*, and diſpoſed of the ſurplus, one-third to his wife, and two-thirds to his daughter, and left his wife and brother executors; defendant married *Helen* the wife, plaintiff married *Helen* the daughter; defendant made a large ſettlement on the plaintiff his ſon on his marriage. Plaintiff falling out with his father, brings his bill for an account of Col. *Lancaſhire*'s perſonal eſtate. At the time of filing the bill, *Helen*, the defendant's wife, was dead, and alſo the brother, who was executor of Col. *Lancaſhire*, ſo that there was no executor or adminiſtrator of Col. *Lancaſhire* before the court, and therefore defendant demurred, and the demurrer was allowed. 3 *P. Wms.* 349. 1734. *Humphreys* v. *Humpheys.*

2. Plea to a bill for diſcovery of aſſets, that the adminiſtrator was not a party, though it was a fact not diſputed, that he was an inſolvent perſon, allowed. 2 *Atk.* 51. 1740. *Aſhurſt* v. *Eyre*, and 3 *Atk.* 341. S. C.

Arbitrators.

3. Where the parties have agreed to make the ſubmiſſion to an award a rule of court, and to be reſtrained from bringing a bill in equity, the arbitrators, notwithſtanding the award be defective in point of law, may plead it in bar to a bill here, and in ſome inſtances, on motion, arbitrators have been ordered to be ſtruck out from being parties. 2 *Atk.* 395. 1742. *Lingood* v. *Croucher.*

Aſſignee.

4. Bill againſt a truſtee (in a mortgage deed by which an annuity of 30*l. per ann.* was ſecured to plaintiff) who had aſſigned his truſt; the aſſignee ought to be made a party; as the decree ſhould be firſt againſt him, and the truſtee to ſtand as a ſecurity. 2 *Bro. Ch. Rep.* 225. 1787. *Burt* v. *Dennet.* See *Obligee.*

Aſſignor.

5. To a bill by aſſignee of a judgment, aſſignor is a neceſſary party. 1 *Veſ. jun.* 463. 1792. *Cathcart* v. *Lewis.*

6. One of two joint-executors and reſiduary legatees aſſigned his intereſt, and died; the aſſignee filed a bill to have half the reſidue transferred to him. The repreſentative of the aſſignor need not be a party, unleſs there appear any doubt of the validity of the aſſignment. *Anſtr.* 651. 36 *G.* 3. *Blake* v. *Jones.*

Attorney-General.

7. The Attorney-General need not be a party to a bill for a private charity, ſuch as a voluntary ſociety to provide for the members and their widows by weekly contributions. 3 *Atk.* 277. 1745. *Anon.*

8. Nor

8. Nor to a bill for an account, where a legacy was given to a charity. 4 *Bro. Ch. Rep.* 38. 1792. *Chitty* v. *Parker.*

9. *Fowler* was outlawed in a civil action at the ſuit of *Peck*, an extent iſſued out againſt him, and an inquiſition and a *levari facias* thereon; by virtue of the *levari* the ſheriff levied 50*l*; and it was moved that it might be paid to *Peck*, which would put an end to all diſputes between them: although *Fowler* conſented by his counſel, yet the court would not do it, becauſe nobody conſented for the crown, and the king is entitled to the 50*l*. *Bunb.* 38. 1718. *Rex* v. *Fowler.*

10. *A.* is indebted to *B.*, *B.* outlawed *A.*; and *C.* having goods of *A.*'s in his hands, *B.* brings a bill againſt *C.* to diſcover what goods of *A. C.* has in his hands, *C.* may demur, for that *B.* makes no title to the goods, as having no grant from the crown; alſo for that the Attorney-General ought to be a party. 2 *P. Wms.* 269. 1725. ——— v. *Bromley.*

11. Anceſtors of plaintiff had a yearly rent of 10 marks iſſuing out of the manor of *Newport Pagnel*, in the county of *Bucks*, and payable to them and their heirs; and this manor afterwards coming to the crown, upon a petition exhibited before *Hen.* 8. in his court of augmentations, it was decreed by the court, upon advice had with the juſtices of the Court of Common Pleas, that the rent ſhould be paid by the king, his heirs, and ſucceſſors, by the hands of his lord of the manor, to the receiver-general of the county; and now the manor being granted out of the crown to the defendant's father in fee, with a covenant to make an allowance to the patentee for that rent, or to the like effect; relief was prayed by the plaintiff againſt the patentee, and granted without making the Attorney-General a party. *Hard.* 181. 13 *Car.* 2. *Stafford* v. *Earl of Angleſey.*

12. The mother of a baſtard by her will gave all her perſonal eſtate to the baſtard, and made *B.* and *C.* executors; mother died; the baſtard died inteſtate, without wife or iſſue; one of the executors brought a bill againſt the mother of her that was the mother of the baſtard, and who had in her hands the baſtard's portion, praying an account of the ſame. The defendant, the mother of the child's mother, demurred for want of parties, in regard the adminiſtrator of the baſtard and the Attorney-General ought to have been brought before the court. Lord Chancellor.—The executor of the baſtard's mother is entitled to the perſonal eſtate of his teſtatrix; and though this may be in truſt for the baſtard, yet as the executor has a legal title, he can give a good diſcharge to the defendant. 3 *P. Wms.* 33. 1729. *Jones* v. *Goodchild.*

13. Where a legacy was given to a charity, upon a bill for an account, it was held neceſſary to make the Attorney-General a party. 4 *Bro. Cha. Rep.* 38. 1792. *Chitty* v. *Parker.*

Bankrupt. 14. It is a general rule that no one need be made a party, againſt whom, if brought to a hearing, the plaintiff can have no decree: thus a reſiduary legatee need not be made a party; and for

for the ſame reaſon, in a bill brought by the creditors of a bankrupt againſt the aſſignees under a commiſſion, the bankrupt himſelf need not be made a party. 3 *P. Wms.* 311. *in notis.*

15. Where a bond creditor brings a bill againſt an executor for an account of aſſets, and for ſatisfaction, it is no objection for want of parties, to ſay he has not brought other bond creditors, or creditors of a ſuperior nature before the court, for any one bond creditor may bring his bill, as the court decrees only an account, and directs the executor to pay in a courſe of adminiſtration; and then the executor may before the Maſter ſet forth as he is conuſant of the eſtate and condition of the teſtator, what debts are prior to the plaintiff's, which he is obliged to pay, as having a legal preference. 3 *Atk.* 572. 1747. *Anon.*

16. Admiral *Leſtock* makes two inſtruments, one a deed by way of agreement between him and the defendant *Monk*, the other a will; by the deed he puts 4000*l.* into the hands of *Monk*, to pay to the admiral himſelf for life, an annuity of 160*l.*, and afterwards to pay 1000*l.* a-piece to *Peacock* and *Cockburn*, if they ſurvived him; and an annuity of 100*l.* for life to Mrs. *Knowles* his houſekeeper, if ſhe ſurvived him; the reſidue to *Monk*; and if the annuity of 160*l.* be unpaid after any quarter-day, *Monk* was to repay the 4000*l.* to Mr. *Leſtock* himſelf, to be placed out in the names of *Leſtock* and *Monk*: by the will he makes *Monk* executor and reſiduary legatee: after his death *Monk* made ſome payments, but diſcontinued them on notice of a bond creditor, apprehending that there would not be ſufficient to pay that and the others alſo; which occaſioned the preſent bill by three perſons claiming the benefit of the truſt ariſing under the deed. Objection, that they had not made the bond creditor a party, who had alſo filed his bill. Objection overruled. 1 *Veſ.* 127. Bond Creditor.

17. *J. S.* late a governor in the *Eaſt Indies*, bought 1000*l.* *South Sea ſtock*, and accepted it in the *South Sea* books ſoon after he bought it. There was another *J. S.* owner of ſome *South Sea* ſtock at the ſame time, who went by the deſcription of *J. S.* of *R.* *J. S.* of *R.* got the 1000*l.* of *J. S.* the governor placed to his account in the *South Sea* books under the deſcription of 1000*l.* *South Sea* belonging to *J. S.* of *R.* In 1725 *J. S.* of *R.* transferred the 1000*l.* *South Sea* ſtock to his broker *B.* to ſell it, which *B.* did. Governor *J. S.* died, when the fraud was diſcovered. The governor's widow demanded the 1000*l.* of *J. S.* of *R.*, who was confounded, and died the day after. Bill by the governor's widow againſt the adminiſtrator of *J. S.* of *R.* and the *South Sea* company. It was objected that the broker ſhould have been a party, but Lord *Harawicke* ruled not. *Barnes*, 324. Broker.

18. Bill by one truſtee of ſtock againſt the other, to compel him to replace it, or give ſecurity according to engagement, when the plaintiff joined in transferring the ſtock into his name. It is not neceſſary that the *ceſtui que truſt* ſhould be a party. 3 *Veſ. jun.* 75. 1796. *France* v. *France*. *Ceſtui que truſt.*

19. Plaintiff

19. Plaintiff being *co-lessee* with *A.* brought his bill to have the rent apportioned on a partial eviction by the lessor, and because the other lessee was neither plaintiff nor defendant, (for if he refused to be a plaintiff he might be a defendant;) the bill was dismissed with costs. *Strange*, 95.

20. A lease of lands is granted, with an exception of mines, *&c.* and the power of working the same; and the lessor covenants to make satisfaction for all damages and spoil of ground, to arise by working the mine. At the time of granting this lease, certain coal mines upon the premises were demised to *J. R.* In a bill brought for the performance of this covenant against the representatives of the lessor, it is necessary to make the lessee of the coal mines a party. 4 *Bro. Par. Ca.* 122. 1733. *Green* v. *Poole.*

Commissioners.

21. Plaintiff was bound for *Clarke*, (who was doorkeeper and accountant of the impress money to the commissioners of excise,) for justly accounting, and for performance of his duty; and he filed his bill against the accountants to the commissioners of excise and the Attorney-General, praying that the accountants to the commissioners might discover certain books stated to have been delivered by *Clarke* to them on his going out of office; by which books it would appear that *Clarke* had paid more than he received; and that the proceedings might stay upon a *scire facias* issued against the plaintiff upon his bond for the recovery of a sum of money said to be unaccounted for by *Clarke*. The commissioners of excise should have been parties. *Bunb.* 291. 1730. *Make-peace* v. *Needler and others.*

22. Bill against an officer under the commissioners for building the new churches is improper. The commissioners only, and not the treasurer, ought to have been parties, for it is absurd to make the person who acts ministerially the sole party. 2 *Atk.* 144. 1740. *Vernon* v. *Blackerby.*

23. Bill by plaintiff, the undertaker of a navigation at *Thirsk* in *Yorkshire*, against the commissioners (named in the act of parliament for carrying it on) who had signed the several orders. There were three questions. Whether the defendants were personally liable? Whether all who were present at any meetings, and had signed some, but not all the orders, were liable to all the orders, or only as to such as they signed? Thirdly, Whether the plaintiff was right in filing his bill in this court, or his remedy was merely at law? The court was of opinion, that the commissioners who signed any of the orders are liable, and that the bill was well brought. 1 *Bro. Ch. Rep.* 101. *in notis.* 1778. *Horsley* v. *Bell.*

Committee.

24. Committee of a voluntary society entering into agreements with tradesmen, for the whole, it is sufficient to make them parties to a bill, and not necessary to add all the other subscribers. 1 *Bro.* 101. 1781. *Cullen* v. *Duke of Queensberry and others.*

Copyright.

25. The proprietor of a copyright must file separate bills against each bookseller selling copies of a spurious edition. So there

there must be separate bills upon distinct evasions of patents; otherwise of a right of fishery or the custom of a mill. 2 *Ves. jun.* 486. 1794. *Dilly* v. *Doig*. *Mayor of York* v. *Pilkington*, 1 *Atk.* 282.

26. In a bill by the plaintiff against the *East India* Company, one of the officers of the company was made a defendant, in order to discover some entries and orders in the books of the Company; demurrer, for that defendant was not charged with being interested in the matters in question, and that his answer could not be read against the Company, as the answer of one defendant cannot be read against the other. Demurrer overruled. 3 *P. Wms.* 310. 1734. *Wych* v. *Meal*. Corporation.

27. A corporation may join in a suit to establish a claim, on behalf of its individual members. *Anstr.* 738. 36 *G.* 3. *Corporation of London and others* v. *Corporation of Liverpool*.

28. A bill was brought by a lessee of 21 years under the dean and chapter of *Winchester* against a lord of a manor and the tenant of a particular house, that it might be pulled down as it obstructed the plaintiff's way to his fields, and to be quieted in the possession of the way in future. Objection for want of parties, because the dean and chapter of *Winchester*, who are the owners of the inheritance, are not brought before the court, and it was held good. 2 *Atk.* 515. 1742. *Poore* v. *Clark*. Dean and Chapter.

29. It is not a general rule that any person who has assets may be made a defendant, for it would be of dangerous consequence to insist that you can make any person a defendant who has assets, unless you can shew to the court he denies that he has any such assets, or applies them improperly. 2 *Atk.* 33. 1739. *Simpson* v. *Vaughan*. Debtor and Creditor.

30. There were three obligors in a bond, plaintiff, the obligee, brought only one obligor before the court and the representative of another, but not of the third, the bill stating him to be dead insolvent. Lord Chancellor *Hardwicke*. The general rule is, where a debt is joint and several, that each of the debtors must be brought before the court, because they are entitled to each other's assistance in taking the account; and debtors are entitled to contribution where one pays more than another. On specialty debts heirs and executors must be parties, but where the obligors are only sureties, they are not necessary parties. 3 *Atk.* 406. 1746. *Madox* v. *Jackson*.

31. The widow and representative of *Newland* brought a bill for an account against Sir *George Champion*, the surviving partner of her husband; her brother, who was a creditor of her husband for 1000*l.*, also brought a bill against Sir *George Champion* for an account. These two causes were brought on together, and it was insisted that the second bill ought to be dismissed, for it would multiply suits if every creditor might not only bring his bill against the personal representative of the debtor, but also against every debtor of that debtor. *Per* Lord Chancellor. The general rule is plain, that a creditor of the testator or intestate need not make

any body a party but the perſonal repreſentative. At the ſame time in this court, if there are any perſons who have poſſeſſed the eſtate, or any debtors of the deceaſed, and any colluſion between them and the repreſentative, they may here make them parties and demand an account againſt them. And an account was decreed between the plaintiff in the ſecond cauſe and Sir *George Champion*. 1 *Veſ.* 105. 1748. *Newland* v. *Champion*. *Peacock* v. *Monk*, *Ibid.* 31. *Atterſon* v. *Mair*, 2 *Veſ. jun.* 95. S. P.

32. An inſolvent debtor is not a neceſſary party to a bill by a purchaſer of his intereſt in ſtock againſt his aſſignee. 3 *B. C. Ch. Rep.* 228. 1791. *Collet* v. *Wollaſton*.

Heirs and Executors.

33. In caſes of ſpecialty debts heirs and executors muſt both be parties. 3 *Atk.* 406. 1746. *Madox* v. *Jackſon*.

34. Where an eſtate has been for ſome length of time quietly enjoyed under a will, it is not neceſſary to make the heir a party to a bill by creditors againſt the deviſees: but generally where lands are deviſed to pay debts, if creditors bring a bill to compel a ſale, the heir is to be made a party; otherwiſe in caſe of a truſt created by deed to pay debts. 3 *P. Wms.* 91, 92. 1730. *Harris* v. *Ingledew*.

Where there is only an equitable charge on a copyhold, and the legal eſtate deſcends to the heir, it is neceſſary to make the heir a party, otherwiſe the legal eſtate of the copyhold could not be conveyed to a purchaſer; but if the heir at law had, after the teſtator's death, conveyed away all the copyhold eſtate, then ſuch grantee being capable of conveying to the purchaſer, it might not be neceſſary to make the heir a party. Ibid, in notis.

35. An heir at law need not be made a party to a bill brought by a deviſee to redeem a mortgage, *unleſs he claims to have the will eſtabliſhed.* 2 *Veſ.* 431. 1752. *Lewis* v. *Nangle*. But deeds cannot be delivered out of court to a deviſee, unleſs the heir is a party to the ſuit. 1 *Veſ. jun.* 29. 1789. *Anon.* Nor can the execution of the truſts of will of real eſtate be decreed, unleſs he is before the court. 1 *Veſ. jun.* 272. 1791. *Graham* v. *Graham*.

36. *A.* covenants for himſelf and his heirs, that a jointure houſe ſhall remain to the uſes in the ſettlement. The jointreſs brings a bill againſt the heir for a performance. Defendant demurs, for that the executor ought to be a party; and allowed. 3 *P. Wms.* 331. 1734. *Knight* v. *Knight*.

In a bill by a mortgagee againſt the heir of the mortgagor to foreclose, the executor of the mortgagee need not be a party. So note the diverſity between the laſt caſe and this; for there the bill was to recover a ſatisfaction in damages for want of repairs, &c. and there the perſonal eſtate is the natural fund for that purpoſe; but here the bill was not to recover the debt, but only to bar the equity of redemption. Ibid, in notis.

37. A bill of diſcovery of real aſſets may be brought againſt the heir in order to preſerve a debt, without making an adminiſtrator of the perſonal eſtate a party; where you ſuggeſt that the repreſentation is conteſting in the eccleſiaſtical court, there a plea for want of parties would not be allowed. 2 *Atk.* 51. 1740. *Plunket* v. *Penſon*.

38. A father by his will appoints an executor *durante minori ætate* of his daughter, and that ſhe ſhould be the executrix when ſhe came of age; the daughter, turned of 21, is brought alone before

before the court, though it appears in the cauſe that the executor, *durante minore ætate*, had collected in the greateſt part of the perſonal eſtate; he ought alſo to be a party. 2 *Atk.* 121. 1740. *Glaſs* v. *Oxenham.*

39. Objection for want of parties upon the 3 *William & Mary*, c. 13. againſt fraudulent deviſes, that the heir at law muſt be before the court; and allowed. 2 *Atk.* 125. 1740. *Warren* v. *Stawell.*

40. Upon an information to apply money, given to a charity, to other uſes than thoſe ſpecified by the will; where there is a reſiduary gift to truſtees for other charitable uſes, the truſtees and the heir, though diſinherited, are neceſſary parties. 2 *Bro. Ch. Rep.* 497. 1789. *Attorney-General* v. *Green.*

41. Bill by deviſees in truſt to ſell for ſpecific performance of an agreement to purchaſe: exception to the report in favour of the title, that the perſons entitled to the purchaſe-money, ſubject to debts and legacies and other charges, were not parties to the ſuit. The Chancellor was of opinion that they were not neceſſary parties to the conveyance, but if they were, that their covenant ought to extend only to their own acts and thoſe of the deviſor, and not to a general warrantry, without a ſpecial contract for it. 3 *Veſ. jun.* 233. 1796. *Wakeman* v. *Ducheſs of Rutland.*

42. A marriage ſettlement having been made of certain lands on the huſband for life, remainder to the wife for life, with divers remainders over; the preſent bill was brought by the huſband to have the opinion of the court, Whether a certain parcel of land was intended to be included in the ſettlement? Objection, that the wife was not made a party, which was allowed, as, if the court ſhould be of opinion againſt the huſband, a decree againſt him would not bind the wife. 1 *Atk.* 290. 1737. *Herring* v. *Yeo.* Huſband and Wife.

43. *J. S.* by his marriage articles, reſerves to himſelf a power to diſpoſe of the lands therein mentioned (and which are ſettled in ſtrict ſettlement) as he ſhould think proper, in caſe he ſettled other lands of the value of 100*l. per annum* to the ſame uſes; there is iſſue of the marriage a daughter. *B.* without notice of this ſettlement, articled with *J. S.* for the purchaſe of theſe lands, but, before the time for completing the payment of the purchaſe-money, *B.* had notice of this ſettlement, and thereupon he refuſed to pay the reſidue. *J. S.* brought his bill in order to compel *B.* to complete his contract, ſuggeſting that at the time this contract was entered into, he had ſettled other lands of the value of 100*l. per annum* to the uſes in the original ſettlement. The wife and daughter ought to have been parties. *Barnard.* 371.

44. To a bill againſt a wife reſpecting her ſeparate property, the huſband is more a formal party than any thing elſe, for the plaintiff really goes againſt the wife reſpecting her ſeparate eſtate. 1 *Veſ. jun.* 277. 1791. *Lillia* v. *Airey.*

45. Where an impropriator's right does not come in queſtion, he need not be a party to a bill for ſubtraction of tithes. 3 *Atk.* 500. 1747. *Carte* v. *Ball.* Impropriator.

Incumbent, Incumbrance. See *Vicar*.

46. Where a mortgagee aſſigns without the mortgagor's joining, the heir of the mortgagor, on preferring a bill to redeem, has no occaſion to bring the original mortgagee before the court, for the aſſignee, as ſtanding in his place, will be decreed to convey. 2 *Atk.* 39. 1740. *Hill* v. *Adams*.

47. Bill to redeem againſt the defendant, who had notice of the plaintiff's title, but bought of the *Marquis of Wharton*, who had no notice; the objection allowed for not bringing the repreſentative of the marquis before the court, otherwiſe the defendant would be deprived of that defence. 2 *Atk.* 139. 1740. *Lowther* v. *Carlton*.

48. Bill of foreclofure againſt a tenant for life, and the firſt remainder-man in tail; the uſual decree was made; the time for redemption being elapſed, *the tenant in tail releaſed the equity of redemption*, ſo that the decree was never made abſolute. Held binding on thoſe in remainder, it being ſufficient to make the firſt tenant in tail party to a bill of foreclofure. *Amb.* 564. 1769. *Reynboldſon* v. *Perkins*.

49. A ſhare of *Covent Garden* playhouſe having been mortgaged, the mortgagee aſſigned the mortgage to a truſtee, in truſt for three perſons, who contributed equal proportions of the money; one of the three filed a bill to foreclofe the equity of redemption. The court was of opinion that one could not foreclofe without making the other two parties. 1 *Bro. Ch. Rep.* 368. 1784. *Lowe* v. *Morgan*.

50. In a bill by a ſecond mortgagee to redeem the firſt mortgage, the mortgagor or his heirs muſt be parties. Where the heir is abroad the court cannot proceed. 2 *Bro. Ch. Rep.* 276. 1787. *Fell* v. *Brown*.

Joint-tenants. See *Pleading*.

Joint-owners, &c.

51. It is not neceſſary to make one joint-owner a party to a bill againſt a factor, reſpecting the moiety belonging to the other joint-owner. 1 *Veſ. jun.* 417. 1792. *Weymouth* v. *Boyer*.

52. Timber purchaſed for a colliery, before it was applied to the uſe of the colliery, ſome of the owners retired; and it was paid for by thoſe only who remained; the former owners are not neceſſary parties to a ſuit by thoſe who remained, againſt the vendor on account of that ſale. 2 *Veſ. jun.* 317. 1794. *Maſſy* v. *Davis*.

53. One part-owner of a ſhip, cannot bring a bill on behalf of himſelf and the other part-owners, but they muſt be all parties. 2 *Bro. Ch. Rep.* 338. 1788. *Moffat* v. *Farquharſon*.

Legatees and reſiduary Legatees.

54. Bill by ſome of the reſiduary legatees, on behalf of themſelves and the other deviſees; all the reſiduary deviſees muſt be parties. 3 *Bro. Ch. Rep.* 365. 1791. *Parſons* v. *Neville*.

55. A reſiduary legatee need not be a party to a bill for a ſpecific legacy. 1 *Veſ. jun.* 313. 1791. *Wainwright* v. *Waterman*.

Vide Vin. Abr. tit. *Copyhold.* (X. c).

Lord of the Manor.

56. Bill does not lie against several tenants of a manor for quit rents. 1 *Bro. Ca. Rep.* 200. 1783. *Bowyer* v. *Prentice.*

Vide Debtors, Pleading.

Obligor.

57. *Per* Lord Chancellor.—It is not necessary, in every case of assignments, where all the equitable interest is assigned over, to make the person who has the legal interest a party; but if an obligee has assigned over the bond, and a presumption of its being satisfied arises from the great length of time, as in the present case, where the bond was given by Sir *James Harrington*'s father in 1709, and assigned over in 1717, and no demand has been made in 22 years, till the bringing of this bill in 1739, by the assignee; the representative of the obligee should be a party. 2 *Atk.* 235. 1741. *Brace* v. *Harrington.*

Obligee.

58. The representative of the obligee, who was dead, ought to be a party in a bill for a *ne exeat regno* against the obligor. 3 *Bro. Ch. Rep.* 25. 1789. *May* v. *Fenwick.*

59. One owner of lands in a township may sue for himself and the other land owners to establish a contributory modus. *Anst.* 768. 36 *G.* 3. *Scarr* v. *Trinity Coll. Cambridge.*

Occupiers of land and land owners.

60. It was held not necessary to make the planters parties to a bill for specific performance of articles entered into in *England* between the proprietors of two provinces in *America* respecting their boundaries, the tenure of the planters being prescribed by the articles. 1 *Ves.* 450. 1750. *Penn* v. *Ld. Baltimore.*

61. Bill for an account and for the delivery of a strong box, which was in the custody of the defendant, and in which were found jewels, and a note in the following words: "Jewels belonging to the Duke of *Devonshire* in the hands of Mr. *Saville*," whose representative the plaintiff was, and in whose possession they had been ever since the year 1695 to the year 1745; not necessary that the duke's representative should be a party. 1 *Ves.* 101. 1748. *Saville* v. *Tankred.*

Pawnor.

62. A cause permitted to be heard without a necessary party, he being beyond sea. *Bunb.* 200. 1725. *Rogers* v. *Linton.*

Party beyond sea.

63. *A.* stated by books in evidence for defendant to be a merchant *abroad*, and one witness swearing he knew him late a merchant *abroad*, and no evidence of his return, he was sufficiently proved out of the jurisdiction, and the defendant was precluded from objecting, that he was not a party. 1 *Ves. jun.* 217. 1792. *Weymouth* v. *Boyer.*

64. A bill charges forgery in a lease, and prays to be relieved against it, but by way of inducement only mentions these were fraudulent circumstances attending this case, without making it a distinct charge from the forgery, or bringing the trustees, who were parties to the lease, and to whom the fraud is imputed, before the court, and for want of this, the defendant's counsel objected to the plaintiff's going on with the cause. Lord *Hardwicke* Chancellor, said, as there had been already a decretal order, and an issue to try the forgery, and brought on now on the equity reserved;

Party to a supplemental bill.

ſerved; the only method to aſſiſt this caſe was, to let the cauſe ſtand over, and to allow the plaintiff, on paying the coſts of the day, to file a ſupplemental bill, in which he may charge the fraud, and make the truſtees parties. 3 *Atk.* 110. 1744. *Jones* v. *Jones.*

65. If the objection by the defendants in the original cauſe, for want of parties to the ſupplemental bill, is not made in the firſt inſtance, it is too late to do it when the cauſe comes on again, where it was put off only for want of formal parties, in order that the decree might be complete. 3 *Atk.* 217. 1745. *Jones* v. *Jones.*

Remainder-man.

66. Where there are ever ſo many contingent limitations of a truſt, it is ſufficient to bring the truſtees before the court, together with *him*, in whom the firſt remainder is veſted. 1 *Atk.* 590. 1738. *Hopkins* v. *Dare.*

67. A remainder-man expectant on an eſtate tail, need not be a party to a bill, one end of which is to impeach a ſettlement, becauſe ſuch remainder-man is not regarded in equity, neither can he be bound. *Eq. Ca. Abr. vol.* 2. 166. *Anon. pl.* 8.

68. In a bill for execution of a truſt by ſettling an eſtate on the ſeveral branches of a family, it is neceſſary to make the firſt perſon entitled to the inheritance a party, if in being. 2 *Veſ.* 492. 1752. *Finch* v. *Finch.*

69. Bill to eſtabliſh a cuſtom, whereby the owners and occupiers of certain lands in the pariſh of *Tort Baldwin*, in the county of *Oxford*, were obliged to keep a bull and boar for the uſe of the pariſhioners. It was objected at the hearing, that a cuſtom which binds the inheritance of the lands can never be eſtabliſhed in a court of equity, without the owners of the inheritance are made parties, as *Queen's College*, (who were owners, *&c.*) ought to have been here; upon which objection the bill was diſmiſſed. *Bunb.* 181. 1724. *Spendler* v. *Potter.*

70. If a remainder-man in tail brings a bill againſt tenants for life to have the title deeds brought into court, and there are annuitants upon the reverſion, and others who have an intereſt in the truſt term, they muſt all be parties. 3 *Atk.* 571. 1747. *Pyncent* v. *Pyncent.*

Tenant in tail.

71. Where a mortgagee has a plain redeemable intereſt, and makes ſeveral conveyances upon truſt, to entangle the affair, and to render it difficult for a mortgagor or his repreſentatives to redeem, there it is not neceſſary that the plaintiff ſhould trace out all the perſons who have an intereſt in ſuch truſts, to make them parties, but where the redemption depends upon equitable circumſtances, and the plaintiff is not in the common caſe of redemption, and where the mortgagee in fee has made an abſolute conveyance, with ſeveral limitations and remainders over, the decree cannot be complete without bringing at leaſt the firſt tenant in tail before the court. 2 *Atk.* 237. 1741. *Yates* v. *Hambly.*

Vendor.

72. If an anceſtor has agreed for the purchaſe of particular lands, and dies before it be completed, and the heir at law brings a bill

a bill againſt the deviſees, who claim under the anceſtor's will made before the purchaſe, the vendor muſt be a party, if his title be doubtful, otherwiſe if it be clear. 1 *Atk.* 572. 1738. *Green* v. *Smith.*

73. Bill by plaintiffs, as leſſees of the rector of *Winterbourne*, for a portion of great and ſmall tithes in *Stoke Gifford*, being a neighbouring pariſh; the tenants and the lay impropriator, who claimed the great tithe in *Stoke Gifford* were made parties; but becauſe the vicar of *Stoke Gifford*, who might be entitled to the ſmall tithe, was not made a party, the bill was ordered to be diſmiſſed; but, upon application, ſtood over with liberty to amend. *Bunb.* 115. 1722. *Baily* v. *Worral.* Vicar.

74. Bill for tithes by the biſhop and ſequeſtrator during the incapacity of the incumbent, diſmiſſed, the incumbent not being made a party. *Bunb.* 141. 1723. *Biſhop of London* v. *Nicholls.*

75. Bill by a vicar, againſt a ſequeſtrator for an account of the profits received during the vacation: it was objected, that the biſhop ought to have been made a party, ſince the ſequeſtrator is accountable to him for what he receives. By the ſtat. 28 *Hen.* 8. the court thought the biſhop ſhould have been a party; by conſent, the cauſe was referred to the biſhop of the dioceſe. *Note*, It was ſaid that a ſequeſtrator could not alone bring a bill for the tithes. *Bunb.* 192. 1724. *Jones* v. *Barrett.*

76. The repreſentatives of the undertakers for briefs, who are dead, need not be brought before the court, for they are each anſwerable the one for the other, and are to be conſidered as one body. 2 *Atk.* 162. 1741. *Ex parte Angel.* Undertakers for briefs.

(C) Want of proper Parties. The Effect thereof. 16 Vin. 257.

1. A Bill is not diſmiſſed for want of proper parties, but ſtands over on paying the coſts of the day, that the plaintiff may have an opportunity of making proper parties. 4 *Bro. Par. Ca.* 122. 1733. *Green* v. *Poole.* 2 *Atk.* 15. 1737. *Anon.* 3 *Atk.* 111. 1744. *Jones* v. *Jones.*

2. If at the hearing the plaintiff waives the relief he prays againſt a particular perſon, the objection for want of his being a party will have no weight. 2 *Atk.* 296. *May* 1742. *Pawlet* v. *Biſhop of Lincoln.*

3. Exceptions may be taken for want of parties at the hearing of the cauſe, or the bill may be demurred to. 2 *Atk.* 510. 1742. *Darwent* v. *Walton.*

4. But it muſt be done at the opening of the proceedings, and before the merits are diſcloſed. 3 *Atk.* 111. 1744. *Jones* v. *Jones.*

5. If the objection by the defendants in the original cauſe, for want of parties to the ſupplemental, is not made in the firſt inſtance, it is too late when the cauſe comes on again, where it was put off for want of formal parties, in order that the decree might be complete. 3 *Atk.* 217. 1745. *Jones* v. *Jones.*

6. Where a cauſe ſtands over for want of making ſome defendants parties, you cannot proceed againſt any other, unleſs the plaintiff will ſubmit to diſmiſs his bill as to thoſe defendants who are improperly brought before the court. 3 *Atk.* 400. 1746. *Wicks* v. *Marſhall.*

16 Vin. 257. (D) Who ſhall be ſaid to be Party. When and by what praying Proceſs.

WHOEVER comes in before a Maſter under a decree, is *quaſi* a party to that ſuit, and if he brings a new bill, a plea that the former ſuit is ſtill depending will be allowed. 3 *Atk.* 557. 1747. *Neve* v. *Weſton.*

[G] Paupers.

16 Vin. 259. (B) In what Caſes and how.

THE affidavit to ground his being admitted to ſue *in formâ pauperis* muſt be made by *himſelf.* 2 *Bro. Ch. Rep.* 272. 1787. *Wilkinſon* v. *Belſher.*

16 Vin. 259. (C) Favoured, indulged, puniſhed, or reſtrained.

1. PLAINTIFFS ſuing *in forma pauperis* ſhall not amend by leaving out defendants without paying their coſts. 2 *Bro. Ch. Rep.* 272. 1787. *Wilkinſon* v. *Belſher.*

2. A pauper ſhall not diſmiſs his bill without coſts. 3 *Bro. Ch. Rep.* 87. 1790. *Pearſon* v. *Belſher.*

3. A pauper is liable to be committed for filing an improper bill. 4 *Veſ. jun.* 630. 1799. *Pearſon* v. *Belſher.*

4. On a motion to ſtay the plaintiff's proceedings as a *pauper*, till he paid coſts in a former action, wherein he was nonſuited; it appeared that the nonſuit was upon a ſlip of the attorney's, and not upon the merits of the cauſe, which the defendant might have gone into notwithſtanding, if he would. The court—This was not vexatious, and therefore refuſed to ſtay proceedings. *Winter* v. *Slow*, 2 *Stra.* 878.

5. *Per curiam*—It is ſettled in *C. B.*, and we rule it ſo here, that a *pauper* ſhall not pay coſts for not going to trial as other plaintiffs do. But if the coſts are taxed, we will prevent his being vexatious, by obliging him to pay them before he ſhall try the cauſe. *Neale* v. *Watts*, 1 *Stra.* 420.

6. It

6. It was moved (on the authority of the above case of *Noaks* v. *Watts*) that the plaintiff, who was a pauper, might be restrained from going on to trial, till he paid costs for former notices. But the court thought that case did not put it on a right foot, and that it was absurd to make any rule about costs whilst the admission stood; and therefore ordered plaintiff to shew cause why he should not be dispaupered. And on affidavit of service made it absolute. *Taylor* v. *Lowe*, 2 *Stra.* 983.

7. After a nonsuit in trespass the court will stay the proceedings in a second action between the same parties for the same cause until the costs of the nonsuit are paid, notwithstanding the plaintiff be a prisoner at the time of bringing the second action, and sue *in forma pauperis*. *Weston* v. *Withers*, 2 *Term Rep.* 511.

8. The plaintiff sued as a *pauper*, and was nonsuited; after which he brought a second action, and recovered. And it was moved on behalf of the defendant, that the costs in the first action might be deducted out of the recovery in the second, but it was refused. *Butler* v. *Innes*, 2 *Stra.* 890.

9. A plaintiff *pauper* is not entitled to issue-money; and if he sign judgment because the defendant does not pay it, the court will set the judgment aside. 5 *Term Rep.* 509.

By a late rule of court no judgment shall be signed for non-payment of issue-money; but the same shall remain to be taxed as part of the costs in the cause. 6 Term Rep. 477. R. M. 36 Geo. 3.—See Rex v. Clarke, 3 Burr. 1308. and Rex v. Peirson, 2 Burr. 1039.

Pawn.

(A) *What.* As to the Interest of Pawnee or Pawnor; *and how considered.* 16 Vin. 263.

1. WHERE money is generally lent upon a pledge it will not deprive the lender of his remedy against the person; but to do that there must be a special agreement to stand to the pledge only. *The South Sea Company* v. *Duncomb*. Trial at bar in *B. R.* 2 *Stra.* 919. 2 *Barnard.* 48. S. C.

2. The difference between bailing and pledging of goods is, that a pawnee hath a special property, and a bailee the custody only. *Hartop* v. *Hoare*, 3 *Atk.* 46.

3. The disposition of a pawn is quite variant from a sale, for a vendee can transfer the thing to any other, and trade is thereby promoted; but it is quite otherwise in the case of pawns, for they tend to stop the change of the property of the things that are pledged; and that is a sufficient difference to make pawning not fall

fall within the cuſtom that a ſale in market overt in an open ſhop in *London* binds the property of a ſtranger. *Id. ib.*

4. Admiral *Stewart* by will gave his plate to truſtees for the uſe of his wife *durante viduitate*, requiring her to ſign an inventory, which ſhe did. She afterwards pawned them with the defendant and died. In trover by the plaintiffs, who claimed under the remainder-man, a ſpecial caſe was reſerved. But the counſel for the defendant gave up the point as clear. *Hoare & al.* v. *Parker*, 2 *Term Rep.* 376.

5. The plaintiff, as aſſignee of the effects of Sir *S. Evance*, a bankrupt, brings his bill againſt the company to oblige them to ſuffer him to transfer the ſtock of Sir *S. E.* The company inſiſt that Sir *S. E.* was their banker, and greatly indebted to them, and that upon the clauſe in the bankrupts' act, which directs the commiſſioners to ſtate the accounts between mutual dealers, they ſhall be allowed to hold the ſtock, and account only for the balance, if any ſhall appear againſt them. And the Chancellor, *aſſiſtante Raymond et Price*, were of this opinion, and decreed accordingly. 1 *Stra.* 645.

Note. But the reporter puts a *quære*. And in *Mellorucchi et Royal Exchange Aſſurance Company*, 1 Eq. Ca. Abr. 8. pl. 8. it is ſaid that there was in this caſe an expreſs by-law to ſubject the ſtock of each member to ſatisfy the debts they ſhould owe to the company. And it was then held that a company has no right to hold the ſtock of a proprietor for money lent to him.

6. Trover by the captain of a ſhip againſt the owner for a parcel of elephants' teeth. The defendant had entered them, together with his own, at the cuſtom-houſe, and paid the duty. It was inſiſted, that the plaintiff ſhould ſhew a tender of the duty, otherwiſe the goods were in the nature of a pledge. But *Eyre* C. J. ſaid, that would not juſtify defendant in keeping them, for he had his action for the money, and if he would ſhew what the duty came to, it might be deducted from the damages; which was done. *Stone* v. *Lingwood*, at *Guildhall*, *Mich.* 12 *G. Stra.* 651.

16 Vin. 264. (B) Redemption. At what Time; and on what Terms.

A Bill was brought by an aſſignee under a commiſſion of bankruptcy for the re-delivery of jewels and plate pledged by the bankrupt to the defendant, who had alſo given a promiſſory note for the delivery over of thoſe goods to the aſſignee, or the value of them, upon the aſſignee's paying him all that was due. By way of defence the ſtatute of limitations was inſiſted upon, and alſo that this being a pledge the remedy was to bring trover, and not by a bill in equity. But Lord *Hardwicke* C. held, that the ſtatute was no bar to this demand, for no time being given for redemption, the bankrupt had during life to redeem; that there were caſes in which there might be a right to come into equity to redeem, and that there was a ſtrong reaſon for it here; the plaintiff being an abſolute ſtranger to what was due, had a right to come

come into equity to know it, in order to make a tender, which he cannot do without tendering the preciſe ſum. *Kemp* v. *Weſtbrook*, 1 *Veſ.* 278.

(D) Redemption of Deeds, &c. pawned.

1. *C.* Having aſſigned a veſſel (in conſideration of a debt due) together with the policy of inſurance upon it, to the plaintiff's teſtator, covenanted that he would keep up the inſurance. The veſſel being at ſea, *C.* made the policy accordingly; but the broker, being his creditor, would not part with it, and *C.* conſented that it ſhould remain with him as a pledge for his debt. The aſſignees of *C.* (who became a bankrupt), having ſatisfied the broker, inſiſted that the broker, being the agent of *C.*, and having the policy in his cuſtody, it was a leaving by the teſtator in the poſſeſſion of the bankrupt within 21 *Jac.* 1. *c.* 19., and refuſed to deliver it up. But Lord *Thurlow* C. decreed for the plaintiff. *Falkner, Executor of Crowder*, v. *Caſe et al.* 1 *Bro. Chan. Rep.* 125.

2. A leaſe having been pledged by a perſon (who afterwards became a bankrupt) to the plaintiff, as a ſecurity for a ſum of money lent to the bankrupt, the pledgee brought his bill for a ſale of the leaſehold eſtate. The Lords Commiſſioners decreed accordingly; for this is not within the ſtatute of frauds, *ſ.* 4. For the contract is executed, and the court has nothing to do but ſupply the legal formalities. *Ruſſel* v. *Ruſſel*, 1 *Bro. Chan. Rep.* 269.

In a note by the reporter, this caſe is ſaid to have come on again, coram Lord *Thurlow* C. who ordered the leaſe to be ſold.

3. In *Featherſtone* v. *Fenwick*, *May* 1784, and *Harford* v. *Carpenter*, 17 and 18 *April* 1785, Lord *Thurlow* C. held, that the depoſit of deeds entitled the holder to have his lien effectuated by a mortgage, although there was no ſpecial agreement to aſſign; the depoſit affording a preſumption that ſuch was the intent. 1 *Bro. Chan. Rep. ib. notis.*

(E) Redemption. Where Goods are pawned by one that is not Owner. 16 Vin. 265.

THOUGH a factor has power to ſell, and thereby bind his principal, yet he cannot affect the property of the goods by pledging them as a ſecurity for his own debt, though there is the formality of a bill of parcels and a receipt. *Per Lee* C. J. 2 *Stra.* 1178.

Payment.

16 Vin. 280. (P) *Payment.* Deviſe or Settlement for Payment of Debts. How. *Pari paſſu.*

1. A Will begins, "As to all my worldly eſtate, my debts being firſt paid, I give, &c." the real eſtate is liable to the debts, nothing being deviſed till the debts are paid. 3 *P. Wms.* 96. *Hil.* 1730. *Harris* v. *Ingledew.*

2. One by will charges all his worldly eſtate with debts, and dies ſeiſed of freehold and copyhold eſtates, which he particularly diſpoſes of by the will; the copyhold, though not ſurrendered to the uſe of the will, ſhall yet be applied to the payment of the debts. *Ibid.*

3. If a man charges all his lands with the payment of his debts, and deviſes part to *A.* and other part to *B.*, &c. the creditors cannot be paid out of the lands till the Maſter has certified what the proportion is, which each deviſee is to contribute: but if the Maſter certifies that the debts will exhauſt the whole real eſtate, then the creditors may proceed againſt any one deviſee for the whole. *Ibid.*

4. Money ariſing from the ſale of lands deviſed to be ſold for the payment of debts, is legal aſſets in the hands of the executor. *Atk.* 420. 1778. *Blatch* v. *Wilder.*

5. Before the marriage of *Edward Joye* with *Mary Broughton*, it was agreed that 300*l.* till it could be laid out in lands, ſhould be ſettled in truſt for *Edward Joye* for life, for *Mary Broughton* for life, and, in default of iſſue, to the uſe of ſuch perſon, and for ſuch eſtate, as ſhe ſhould by any deed direct or appoint, and for default of ſuch appointment, to her right heirs for ever. *Mary*, by deed-poll appoints the 300*l.* to be paid to her huſband, to be employed by him to ſuch charitable uſes, or other purpoſes, as he ſhould think fit. *Edward* deviſes this 300*l.* to the defendants, in purſuance of his wife's directions. The 300*l.* conſidered as part of *Edward*'s aſſets, and *applied in payment of his debts.* 1 *Atk.* 465. *Nov.* 1739. *Hinton* v. *Joye.*

6. The marſhalling of aſſets by letting ſimple contract creditors come in the place of a ſpecialty creditor, can only be where the ſpecialty creditor had a remedy againſt the real and perſonal eſtate of the debtor deceaſed, whoſe aſſets are in queſtion. 1 *Ves.* 312. *Nov.* 1749. *Lacam* v. *Martins.*

7. The court will go as far as it can to attain the payment of debts: real eſtate, where charged, is affected by equitable, as well as by other debts. 1 *Ves.* 483 & 495. *June* 1750. *Aſley* v. *Powis.*

8. Deviſe

8. Deviſe that all debts ſhould be firſt paid and ſatisfied: cuſtomary lands ſurrendered in truſt for ſeveral, and for the uſe of ſuch as the teſtator ſhould appoint, and deviſed in diſtinct parts from the reſt, are ſubject to debts; the firſt diſpoſition running over all. 2 *Veſ.* 271. 1754. *Earl of Godolphin* v. *Penrick.*

9. The moſt liberal conſtruction of wills is to be made for creditors. *Ibid* 272.

10. Additional legacy to *A.* charged on the real and perſonal eſtate, the other legacies not charged on the real eſtate: If *A.* exhauſts the perſonal eſtate, the other legatees ſhall have ſatisfaction *pro tanto* out of the real. *Ambl.* 127. *Hanby* v. *Roberts.*

11. Equity of redemption of a leaſehold eſtate held to be equitable aſſets. *Ambl.* 308. 1756. *Hartwell* v. *Chitters.*

12. The queſtion, whether a reverſion after ſeveral eſtates tail, falling in after the death of the reverſioner, be aſſets to pay his debts, agitated, but not determined. 1 *Bro. Ch. Ca.* 240. *March* 1783. See *Frederick* v. *Aynſcomb*, 1 *Atk.* 392.

13. An equity of redemption may be deviſed, granted, or entailed, and ſuch entail may be barred by fine and recovery, and the perſon entitled to it is the owner of the land, and a mortgage in fee is conſidered as perſonal aſſets. 1 *Atk.* 605. *Hil.* 1737. *Caſborne* v. *Scarfe.*

14. Admiſſion of aſſets by the executor to one legatee, is an admiſſion to all. 2 *Atk.* 3. *Eaſt.* 1737. *Cook* v. *Martyn.*

15. Where an executor is alſo a truſtee for payment of debts, the aſſets ſhall be legal. 2 *Atk.* 50. *July*, 1740. *Lewin* v. *Okeley.*

16. *Ceſtui que truſt* of a real eſtate made a mortgage upon it in fee, and deviſed the equity of redemption to his ſon and his heirs, ſubject to the payment of his debts, and died indebted by bond, and ſimple contract; as this was a mortgage of the whole inheritance, and nothing remaining in the mortgagor, the bond-creditor can have no preference, but muſt be paid *pari paſſu* with the other creditors. 2 *Atk.* 290. *April* 1742. *Plunket* v. *Penſon.*

17. When a plaintiff, eſpecially a creditor, muſt come into equity for relief, the court will do equal juſtice to all creditors, without any diſtinction as to priority. *Ibid.*

18. After aſſets are diſcovered in equity, the plaintiff ſhall not be ſent to law, but ſhall be decreed a ſatisfaction. 2 *Atk.* 363. *June*, 1742. *Slater* v. *Hambly.*

19. *H.* being ſeiſed in fee of an eſtate, borrowed money in 1724, gave a bond for it, and a mortgage in 1728. He deviſed the mortgaged eſtate and a freehold for three lives to his wife, and appointed her ſole executrix. The queſtion was, if the perſonal eſtate were not ſufficient to pay the mortgage, whether the eſtate deſcended on the plaintiff ſhould make up that deficiency, ſo that the eſtate deviſed to the wife might not be affected whilſt there were real aſſets. Court of opinion that the wife had a right to have the deviſed eſtate exonerated out of the real eſtates deſcended. 2 *Atk.* 430. *June* 1744. *Galton* v. *Hancock.*

20. If

20. If a perſonal eſtate is increaſed by any event after the teſtator's death, it is part of the reſidue, and will paſs as ſuch, and ſo will the intereſt of that reſidue, for that intereſt is aſſets, 2 *Atk.* 473. *Dec.* 1742. *Green* v. *Ekins.*

21. *A.* had power to charge a ſum of money on land by deed or will, and executes it by a voluntary deed; the court in favour of the creditors of *A.* will conſider it as aſſets. 3 *Atk.* 269. *July* 1745. *Pack* v. *Bathurſt.*

22. Where the perſonal eſtate has been exhauſted in payment of ſpecialty creditors, the widow ſhall ſtand in their place, as to the amount of her paraphernalia upon the real aſſets of the heir at law. 3 *Atk.* 369. *June* 1746. *Snelſon* v. *Corbet.*

23. The teſtator deſires that all his debts may be diſcharged by his executors, adding, "I mean thoſe only of my own contracting, not thoſe heavier debts by my family," and gives his perſonal eſtate to his mother, whom he makes executrix, deſiring her to pay all his juſt debts exactly: long after making the will the mother buys in mortgages charged on his eſtate by his anceſtors, and the ſon covenants to pay the money. The perſonal eſtate is ſtill exempted from the principal and intereſt due on theſe mortgages, which are ſtill a charge on the real. 1 *Veſ.* 51. *Nov.* 1747. *Leman* v. *Newnham.*

24. Deviſee in truſt for payment of debts mortgages the eſtate to one of the creditors: he ſhall not retain it for his former debt, but come *in pari paſſu.* 1 *Veſ.* 215.

25. Sir *R. W.* reciting himſelf to be ſeiſed, ſubject to incumbrances, of an eſtate which was mortgaged, deviſed another eſtate for a term of twenty-one years in aid of his perſonal eſtate to pay bond, and book debts, and by a ſubſequent clauſe to pay all his debts: the perſonal eſtate, and the term ſhall exonerate the mortgaged eſtate. 1 *Bro. Ch. Rep.* 240. *March* 1783. *Marchioneſs Dowager of Tweedale* v. *Earl of Coventry.*

26. Deviſe of an eſtate for payment of debts takes it out of the ſtatute againſt fraudulent deviſes. On a direction to pay out of the rents and profits, no ſale, or mortgage can be made. 1 *Bro. Ch. Rep.* 311. *Oct.* 1783. *Linguard* v. *Earl of Derby.*

27. Deviſe to ſell the reſidue, after payment of debts, and the money to be part of the perſonal eſtate, on a total inſolvency, held to be equitable aſſets. 2 *Bro. Ch. Rep.* 94. 1786. *Batſon* v. *Lindegreen.*

28. A ſum of money being in court to be laid out in lands, which when purchaſed would be ſubject to the bond debts of the teſtator, the debts were decreed to be paid out of the fund in court. 3 *Bro. Ch. Rep.* 256. *Eaſt.* 1791. *Cattell* v. *Money.*

29. An equity of redemption is not equitable aſſets, at leaſt as againſt judgment creditors, who have a right to redeem. 4 *Veſ. jun.* 538. *April* 1799. *Sharpe* v. *Earl of Scarborough.*

(Q) What Debts to be paid by virtue of ſuch Deviſe or Settlement. 16 Vin. 282.

ONE owes a debt of ſimple contract, ſix years paſt, whereby his debt is barred; after which the debtor by will charges his lands with the payment of all his debts, and dies; this debt is revived. 3 *P. Wms.* 84. *Jones* v. *Earl of Strafford.*

See *Limitation, Truſt, &c.*

(R) Deviſe or Settlement for Payment of *Debts or Legacies.* Where they ſhall be paid *pari paſſu.* 16 Vin. 285.

1. *A.* By his will gives an eſtate for life to his wife, and in the latter part creates a truſt term for payment of debts, to take place from the day of his death: the term, though ſubſequent, ſhall take place of the wife's eſtate for life, eſpecially as it is a truſt term for raiſing money. It is immaterial how a teſtator places the ſeveral deviſes in a will, becauſe the whole muſt be conſtrued together, ſo as to make it conſiſtent. 1 *Atk.* 419. 1737. *Ridout* v. *Dowding.*

2. The rule as to marſhalling aſſets on behalf of a legatee obtains only where it was proper to be done at the time when the legacy took place. 1 *Atk.* 486. *Eaſt.* 1738. *Prowſe* v. *Abingdon.*

3. The plaintiff lent *A.* 500*l.* on note, on aſſurance that an aunt had left him 4000*l.* by will. *A.* died ſoon after, and his repreſentatives refuſed to pay the 500*l.* as the legacy was directed to be laid out in land, and ſettled on *A.* in fee; the court could not let in a ſimple contract creditor upon money ſo deviſed. 2 *Atk.* 307. *June* 1742. *Trelawny* v. *Booth.*

4. As long as the fund exiſts upon which a legacy is charged, though it devolves upon the heir or executor, yet they take it ſubject to the charge. 2 *Atk.* 605. 1743. *Wills* v. *Wirley.*

5. *A.* agreed to purchaſe an eſtate of the plaintiffs for 1200*l.* but died before he had paid the whole purchaſe-money; *A.* by will, after giving 800*l.* legacy to his ſiſter, deviſes the eſtate purchaſed, and all his perſonal eſtate, to *J. K.* and makes him executor; *J. K.* commits a *devaſtavit* and dies, and the purchaſed eſtate deſcends to *B. K.* his ſon. The court, to give the legatee a chance of being paid her legacy out of the perſonal aſſets, directs the plaintiff to take his ſatisfaction upon the purchaſed eſtate for the remainder of the purchaſe-money. 3 *Atk.* 272. *Feb.* 1745. *Pollexfen* v. *Moore.*

6. Aſſets not marſhalled in favour of a charity. 1 *Veſ.* 110. 1748. *Arnold* v. *Chapman.*

7. The

7. The real aſſets of *A.*, who took out adminiſtration to the executrix of *B.*, and adminiſtered *de bonis non* to *B.*, and who entered into the uſual bonds to the ordinary, followed by *B.*'s legatees. 2 *Veſ.* 368. 1751. *Aſhley* v. *Bailie.*

8. Legatees are not entitled to ſtand in the place of ſpecialty creditors againſt a deviſee. *Ambl.* 171. 1753. *Forreſter* v. *Lord Leigh.*

9. By deviſe of real and perſonal, after payment of debts and legacies, the real eſtate is liable to debts contracted afterwards, and to legacies given by a codicil not atteſted according to the ſtatute. *Ambl.* 556. *Nov.* 1752. *Hannis* v. *Packer.*

10. *A.* by will appoints a certain perſon to ſell his eſtates for payment of debts and legacies; bill by creditor and legatees, who are papiſts, to be paid; and held entitled. *Ambl.* 767. *Feb.* 1776. *Feone* v. *Blount.*

11. The court refuſed to give a widow ſatisfaction out of the real eſtate deviſed and charged with debts, for her paraphernalia, which had been ſold to pay her huſband's debts. *Ambl.* 6. *May* 1739. *Probert* v. *Clifford.*

12. Bill filed by a tutor for an annuity of 200*l.* for his own life againſt the executors of the pupil, who by his will charged his eſtate with all his debts, by bond, morrgage, or ſimple contract. The claim was ſupported by letters referring to an annuity, but no ſpecific length of time named. Bill diſmiſſed without coſts. 1 *Bro. Ch. Rep.* 34. *Hil.* 1779. *Jameſon* v. *Skipwith.*

13. Legacies, no fund being deſcribed, to be paid in the currency of the country where the will was made. 2 *Bro. Ch. Rep.* 38. 1786. *Pierſon* v. *Garnet.*

14. Teſtator ordered his eſtate to be ſold, and, after giving a legacy to his wife, directed the remainder to be veſted in his executors for payment of debts; the money ariſing from the ſale is equitable aſſets. 1 *Bro. Ch. Rep.* 135. *Eaſt.* 1782. *Newton* v. *Bennett.*

15. Where the teſtator by his will had ordered the truſtees to poſſeſs themſelves of his eſtates and ſubſtance, and to pay debts, it was held that this was a charge on the real eſtate, and that the aſſets ſhould be marſhalled for the legatees to let them in ſo far as the perſonal eſtate had paid towards the debts. 3 *Bro. Ch. Rep.* 347. *Auguſt* 1791. *Foſter* v. *Cook.*

16. Legacy charged upon real eſtate, and payable at a future day, ſinks as to the real eſtate, by the death of the legatee before the time of payment, and the aſſets cannot be marſhalled. 3 *Veſ. jun.* 135. *June* 1796. *Pearce* v. *Loman.*

17. Notwithſtanding declarations of the teſtator to his executor, that he never meant to call for payment of a promiſſory note, it was held part of the aſſets, which were inſufficient for the legacies, a charge on the real eſtate failing for want of proper atteſtation of the will. 4 *Veſ. jun.* 6. 1798. *Byrn Godfrey.*

(T) What ſhall be liable to the Payment, or ſhall be ſaid charged. 16 Vin. 286.

1. ONE deviſes all his perſonal eſtate to his daughters, and all his real eſtate to truſtees in truſt to pay debts, &c. remainder to his daughter in tail, remainder over: the perſonal eſtate ſhall in the firſt place be all applied to pay the debts. 3 *P. Wms.* 324. *Trin.* 1734. *Haſtewood* v. *Pope.*

2. A proviſo in the will, that if the teſtator's perſonal eſtate, and houſe and lands at *W.* ſhould not pay his debts, then his executors to raiſe the ſame out of his copyhold premiſes; the rents not being ſufficient to diſcharge the teſtator's debts, theſe words will give the truſtees a power to ſell the copyhold lands to ſatisfy his intention of paying his debts. 1 *Atk.* 421. *Nov.* 1739. *Bateman* v. *Bateman.*

3. A man cannot, by any expreſſion in his will, alter his eſtate and diſappoint his creditors. 1 *Atk.* 465. 1739. *Hinton* v. *Toye.*

4. Where a real eſtate is expreſsly deviſed for payment of debts, the perſonal eſtate is exempted; but if the real is not ſufficient, the perſonal muſt be applied. 2 *Atk.* 79. *Nov.* 1740. *Bickner* v. *Page.*

5. Debts and legacies are by will directed to be raiſed by perception of rents and profits, or by leaſing or mortgaging the land; this reſtrains it merely to a payment out of rents, and the court cannot decree a ſale. 2 *Atk.* 105. *Dec.* 1740. *Ridoubt* v. *Earl of Plymouth.*

6. A man cannot by any form of conveyance, raiſe a fee ſimple to his own right heirs, by the name of heirs, as a purchaſe, ſo as to prevent the reverſion from being aſſets to ſatisfy the ſon's debts. 2 *Atk.* 57. *Oct.* 1740. *Godolphin* v. *Abingdon.*

7. *George Ward*, having power to charge his eſtate with 2000*l.* by his will gives 500*l.* apiece to his two ſiſters, and dies indebted to the plaintiffs; this 2000*l.* is the perſonal eſtate of *George Ward*, and liable to his debts. 2 *Atk.* 172. *April* 1741. *Bainton* v. *Ward.*

8. If a man makes no diſpoſition of a reverſion in fee, which he has power to diſpoſe of, yet it ſhall be aſſets. *Ibid.*

9. *Thomas Delaboy*, on his marriage, ſettled his eſtate on himſelf for life, on his wife for life, remainder to truſtees to preſerve contingent remainders, remainder to his firſt and every other ſon in tail male, remainder to himſelf in fee. A ſon is born; the father dies indebted by bond; the ſon afterwards dies without iſſue, but by his will deviſes the eſtate to the defendant in fee: the reverſion being come into poſſeſſion, was held aſſets to pay the father's debts. 2 *Atk.* 204. *Trin.* 1741. *Kinnaſton* v. *Clark.*

10. Though a real eſtate be deviſed to be ſold, yet if a teſtator has done nothing to exempt the perſonal eſtate, it ſhall be

primarily liable; the rule is, the perſonal eſtate ſhall be firſt applied, unleſs there be expreſs words, or a plain intention of the teſtator to exempt it, or to give it as a ſpecific legacy. 2 *Atk.* 624. *July* 1743. *Walker* v. *Jackſon.*

11. A fire engine, ſet up for the benefit of a colliery by a tenant for life, ſhall be conſidered as part of his perſonal eſtate, and go to the executor for the increaſe of aſſets in favour of creditors. 3 *Atk.* 13. *Dec.* 1743. *Lawton* v. *Lawton.*

12. Where a teſtator charges all his eſtates for payment of his debts, the deviſee of a particular one muſt take ſubject to that charge. 3 *Atk.* 101. 1744. *Clark* v. *Sewel.*

13. *A.* deviſes to Sir *J. B.* his heir *Cliſton* lands, he paying all debts and legacies charged on theſe lands, and after his deceaſe to his nephew. Sir *J. B.* as tenant for life, is obliged to keep down the intereſt, if the principal is not diſcharged; but if it be, he is to pay one third and the reverſioner two thirds. 3 *Atk.* 201. 1744. *Bridgeman* v. *Dove.*

14. Proviſions in wills for payment of debts relate to the time of the teſtator's death: the words, "all the debts which I have contracted" muſt be conſtrued, ſhall contract. *Ibid.*

15. The perſonal eſtate is liable to pay the debts, unleſs there is a ſpecial exemption of it. *Ibid.*

16. An advowſon in fee in groſs is aſſets by deſcent to ſatisfy bond creditors. An eſtate *pur auter vie*, though it is deviſed, will be liable to debts by ſpecialty to contribute in a courſe of adminiſtration. 3 *Atk.* 460. *March* 1746. *Weſtfailing* v. *Weſtfailing.*

17. Where a man takes an eſtate as executor, it is aſſets, for as an executor he can take nothing without doing ſo. As before the ſtatute of frauds, granting an eſtate *pur auter vie* to *A.* his executors, *&c.* would have made it aſſets: deviſing it them makes it equally ſo. *Ibid.*

18. Aſſets, deſcended on the heir at law, muſt be applied to the payment of debts before the lands can be charged, which are ſpecifically deviſed. 3 *Atk.* 556. *Auguſt* 1747. *Powis* v. *Corbet.*

19. The executor of a bond creditor of Sir *W. F.*'s brings a bill for an account of his perſonal eſtate, and if that falls ſhort of ſatisfying the debts, prays that a ſufficient part of the real eſtate may be ſold. The real eſtate never having been aſſets of Sir *W. F.*, the lands compriſed in the ſettlement made after his marriage, are not liable to his debts by ſpecialty, for they are not ſpecific liens upon the eſtate. 3 *Atk.* 631. *March* 1747. *Brown* v. *Danton.*

20. Where a legacy is charged on real eſtate, the perſonal is not to be applied in aid. 1 *Veſ.* 482. 1750. *Ameſbury* v. *Brown.*

21. Bequeſt of 100*l.* to a daughter, to be paid by the executor within a month after the death of the widow, to whom the real eſtate was deviſed for life, and afterwards to the ſon, the executor, in fee; two truſtees or overſeers being appointed to ſee the will performed:

performed: on a deficiency of assets the real estate shall be charged with the 100*l.* 1 *Ves.* 499. *July* 1750. *Lypet* v. *Carter.*

22. A charge by the will of the whole real estate in aid of the personal, for debts and legacies, is not restrained by a subsequent devise of a particular part for that intent, without negative words for that purpose. 2 *Ves.* 568. *August* 1754. *Ellison* v. *Airey.*

23. Devise in trust to pay debts is out of the statute against fraudulent devises. 2 *Ves.* 590. 1754. *Earl of Bath* v. *Earl of Bradford.*

24. Personal estate held not exempt from debts and legacies, by a devise of a competent part of real estate to be sold to pay them. *Ambl.* 33. 1744. *Lord Inchiquin* v. *French.*

25. Legatees are not entitled to stand in the place of specialty creditors against a devisee. *Ambl.* 171. 1753. *Forrester* v. *Lord Leigh.*

26. *A.* devises the residue of his real estate to be sold for payment of debts, and the surplus money he gives to nine persons; the residue of his personal he gives to his sister, and makes her executrix: held she took the personal exempt from debts. *Ambl.* 581. *Mich.* 1716. *Hayford* v. *Benlows.*

27. Devise of the remainder of effects, mortgages, bonds, *&c.* to charity, the court ordered the mortgage money to be first applied to pay debts. *Ambl.* 635. *Dec.* 1766. *Attorney-General* v. *Caldwell.*

28. The testator charges his real estate, which was subject to a mortgage contracted by his ancestor, and also all his personal estate, with his debts and legacies. The mortgage shall be borne by the estate originally liable, not paid out of his estates, and the executrix, having paid it out of the personal estate, shall be repaid the money. 1 *Bro. Ch. Rep.* 58. *Trin.* 1779. *Lawson* v. *Hudson.*

29. A legacy of 100*l.* out of the freehold and copyhold estates, also to be borne by that fund, and not paid out of the personal estate. *Ibid.*

30. In order to exonerate the personal estate from the payment of debts and legacies, it is necessary not merely to charge the real estate, but the will must direct the application of the personal estate. 1 *Bro. Ch. Rep.* 144. *East.* 1782. *Samwell* v. *Wake.*

31. Debts being charged by will on all testator's worldly estates, copyhold lands are liable, as well as freehold. 1 *Bro. Ch. Rep.* 273. 1783. *Coombes* v. *Gibson.*

32. Notwithstanding the testator charges a term for payment of debts, a leasehold estate purchased by him subject to a mortgage, shall bear the burthen of that mortgage, it not being properly the debt of the testator. 1 *Bro. Ch. Rep.* 454. 1785. *Duke of Ancaster* v. *Meyer.*

33. The personal estate shall not exonerate the real of a debt not contracted by the party. 2 *Bro. Ch. Rep.* 57. 1785. *Earl of Tankerville* v. *Fawcett.*

34. Eſtate deviſed to be ſold for payment of debts, decreed ſo to be, without expreſs words to exonerate the perſonal. 2 *Bro. Ch. Rep.* 60. 1786. *Webb* v. *Jones.*

35. *A.* purchaſed an eſtate ſubject to a mortgage; the perſonal eſtate ſhall not exonerate the real of the mortgage debt, though the purchaſer has given a freſh ſecurity. 2 *Bro. Ch. Rep.* 101. 152. *Tweddell* v. *Tweddell.*

36. Although generally a deſcended eſtate ſhall be applied in exoneration of a deviſed eſtate, though under a charge for payment of debts, yet it ſhall not be ſo if the deviſed eſtate be expreſsly pointed out in aid of another fund provided for that purpoſe. 2 *Bro. Ch. Rep.* 257. *Nov.* 1787. *Donne* v. *Lewis.*

37. The perſonal eſtate, given to the next of kin, muſt be applied in diſcharge of the teſtator's mortgages not being expreſsly exempted, although it will be thereby exhauſted. 2 *Bro. Ch. Rep.* 273. *March* 1787. *Philips* v. *Philips.*

38. There being a proviſion in a ſettlement of 5000*l.* for a younger child at 21, the father by will added 5000*l.* more, and charged all on a reſiduary real fund, which he had alſo made liable to debts and legacies in aid of his perſonal eſtate; the charged eſtate ſhall not be exonerated by the perſonal. 2 *Bro. Ch. Rep.* 316. *March* 1748. *Ward* v. *Lord Dudley.*

39. Leaſehold eſtates ſpecifically deviſed ſhall be applied in payment of debts before copyhold deviſed for that purpoſe, but unſurrendered. 2 *Bro. Ch. Rep.* 325. *April* 1788. *Bixley* v. *Ealing.*

40. Eſtates charged by will with the payment of debts ordered to be ſold if neceſſary; the heir at law being in the *Eaſt Indies*, and the deviſee inſane. 2 *Bro. Ch. Rep.* 399. *Dec.* 1788. *Williams* v. *Whingate.*

41. Under a general charge for payment of debts, where the teſtator had freehold and copyhold eſtates, and ſold all his freehold in his lifetime, the copyhold were held liable. 3 *Bro. Ch. Rep.* 257. *Eaſt.* 1791. *Kentiſh* v. *Kentiſh.*

42. Teſtator having two eſtates on mortgage, orders the debt upon the one to be paid out of his perſonal eſtate, and charges the other upon the mortgaged premiſes, and gives the reſidue of his perſonal eſtate to perſons, by whoſe death in his lifetime it lapſes; the mortgage debt charged upon the mortgaged premiſes ſhall be paid out of the perſonalty; for though he exonerated the perſonal eſtate for the legatees, *non conſtat*, he meant ſo to do for the next of kin. 3 *Bro. Ch. Rep.* 322. *Auguſt* 1791. *Hale* v. *Cox.*

43. Teſtator by his will ordered the truſtees to poſſeſs themſelves of his eſtates and ſubſtance, and to pay debts. This is a charge of the debts on the real eſtate. 3 *Bro. Ch. Rep.* 347. *Auguſt* 1791. *Foſter* v. *Cooke.*

44. Money having been ordered to be paid to the huſband in right of his wife, and he dying before payment, it was held a veſted intereſt, and payable to his executor. 3 *Bro. Ch. Rep.* 362. *Auguſt* 1791. *Heygate* v. *Anneſley.*

45. Deviſe

45. Deviſe of copyhold ſubject to a mortgage, not ſufficient to exonerate the perſonal eſtate from the payment of the mortgage money. 3 *Bro. Ch. Rep.* 545. *Eaſt.* 1792. *Aſtley* v. *Earl of Tankerville.*

46. *A.* being maſter of both funds, charges a debt, which was perſonal, on the real eſtate; his heir ſhall not have it exonerated by the perſonal eſtate. 4 *Bro. Ch. Rep.* 199. *Hil.* 1793. *Hamilton* v. *Worley.*

47. *After paying debts* amounts to a charge for debts, for which very little is ſufficient, the court leaning that way. 1 *Veſ. jun.* 440. 1792. *Ridney* v. *Couſſmaker.*

48. Though a general charge of debts upon a deviſed eſtate will not prevent the previous application of an eſtate deſcended, yet if the deviſed eſtate is ſelected, and appropriated to the debts, it is liable before the eſtate deſcended: but this arrangement does not bind the creditor. 3 *Veſ. jun.* 114. *July* 1796. *Manning* v. *Spooner.*

49. The order of application of debts: 1ſt, the perſonal eſtate, unleſs exempted expreſsly, or by plain implication; 2dly, eſtates deviſed for the particular purpoſe of paying debts; 3dly, eſtates deſcended; 4thly, eſtates deviſed. 3 *Veſ. jun.* 117. *July* 1796. *Manning* v. *Spooner.*

50. Real eſtates deviſed held liable to ſimple contract debts under a direction in the beginning of the will, that debts and funeral expences ſhall firſt be paid: that which deſcended to the heir by the failure of the deviſe to be firſt applied. 3 *Veſ. jun.* 545. *Auguſt* 1797. *Williams* v. *Chitty.*

51. Deviſe after payment of debts; the lands are charged. 3 *Veſ. jun.* 738. *May* 1798. *Shallcroſs* v. *Finden.*

52. Specific diſpoſition by will, ſubject to annuities and legacies, held auxiliary only; the general perſonal eſtate to be applied in the firſt inſtance. 4 *Veſ. jun.* 76. *July* 1798. *Halford* v. *Wood.*

53. To exempt the perſonal eſtate from the payment of the debts, the will muſt afford a neceſſary implication, *viz.* that inference that leaves no doubt upon the mind of the judge. 5 *Veſ. jun.* 540. *July* 1800. *Hartley* v. *Hurle.*

54. Teſtatrix after giving an annuity and legacies, deviſed her real eſtate ſubject to the ſaid annuity and legacies, and her debts and funeral and teſtamentary expences, and the debts of her late brother. The aſſets were marſhalled in favour of a legatee by a codicil. 4 *Veſ. jun.* 769. 1799. *Norman* v. *Morrell.*

55. The perſonal eſtate being amply ſufficient for the debts, though not equal to the diſcharge of the legacies in full, and the real eſtate being deviſed, the court would not, under a direction to the executors to pay the debts and funeral expences as ſoon as conveniently might be, marſhal the aſſets in favour of the legatees. 5 *Veſ. jun.* 359. *March* 1800. *Keeling* v. *Brown.*

See *Charge, Condition, Tender, Trial, Aſſets, Deviſe,* and other proper titles.

Penalty.

26 Vin. 301. (A) Penalty of Bonds, &c. *Relieved or enlarged.* And what ſhall be ſaid a Penalty.

1. THE bill was for relief againſt a judgment on a bond, in which the plaintiff was jointly bound with his ſon, in the penalty of 100*l.*, that the ſon ſhould not commit any treſpaſs in the Duke of *Beaufort's* royalty, by *ſhooting*, *hunting*, *fiſhing*, &c. except with the licence of the gamekeeper, or in company with a qualified perſon: the ſon having caught two flounders with an angle rod, the bond was put in ſuit, and judgment for the penalty: the gamekeeper's brother-in-law, and a ſervant of the duke's, aſked the plaintiff's ſon to angle with them, when he caught the flounders; and the verdict was found merely on their evidence. Lord *Hardwicke*, Chancellor, decreed the plaintiff ſhould be relieved againſt the verdict, and that the duke ſhould refund the 100*l.* recovered on the bond, and the 40*l.* damages. 2 *Atk.* 190. 1741. *Roy* v. *Duke of Beaufort.*

2. A bond given by plaintiff to defendant, who was a hair merchant, as a ſecurity for his ſervice and behaviour in *Flanders* as an agent for buying hair; and as a ſecurity for his performance of the agreement he depoſited 100*l.* in defendant's hands. He bought only 5*l.* worth of hair, and returned to *England* before the time agreed. This penalty cannot be decreed here, *becauſe this is a bond for ſervice* only, and different from a *nomine nænæ* in leaſes to prevent a tenant from ploughing. 3 *Atk.* 395. 1746. *Benſon* v. *Gibſon.*

3. Where a perſon is guilty of a breach of a bond given as a ſecurity not to defraud the revenue, this court will not relieve againſt it, becauſe it is conſidered in law as a crime. *Ibid.*

4. The court in this caſe can only direct an action at law upon a *quantum damnificatus* to try how far the defendant has been damnified. *Ibid.*

5. On marriage the two fathers agree to ſettle lands. One does ſo: the other gives a bond of 600*l.* with 1200*l.* penalty, if he does not, he has not election afterwards to forfeit the 600*l.* or ſettle, the ſettlement being the primary agreement, and the 600*l.* only a penalty for further ſecurity. 2 *Veſ.* 528. 1754. *Chilliner* v. *Chilener.*

6. In a leaſe of lands renewable for ever, the leſſee covenants, that he and his heirs ſhall, with all their family, live on the demiſed premiſes during the continuance of that and every other leaſe; and that whenever he or they ſhall fail ſo to do, an additional

tional rent ſhall become payable, with the uſual remedies of diſtreſs and entry to compel the payment thereof. The reaſonableneſs of this covenant is properly triable at law, and a court of equity ought not to interpoſe or give relief againſt it. 6 *Bro. P. C.* 417. 1770. *Ponſonby* v. *Adams.*

7. A leſſee covenants not to plough up any of the ancient meadow or paſture ground, and if he does to pay an additional yearly rent of 5*l.* an acre. This increaſed rent is not to be conſidered as a penalty, but as a liquidated ſatisfaction, fixed and agreed upon by the parties. And therefore upon an action brought for recovering it, a court of equity ought not to interpoſe, or give any relief. 6 *Bro. P. C.* 470. 1772. *Rolfe* v. *Peterſon.*

8. Where the penalty of a bond is only to ſecure the enjoyment of a collateral object, equity will grant an injunction againſt a ſuit for the recovery, and an iſſue *quantum damnificatus* to try the damages. 1 *Bro. Ch. Rep.* 418. 1784. *Sloman* v. *Walter.* See *Hardy* v. *Martin.* 1783. S. P. *in notis.*

9. Upon an information and verdict againſt ſeveral perſons, for obſtructing a cuſtom-houſe officer contrary to the ſtatute 18 *Geo.* 1. *c.* 18. *ſ.* 25. each defendant is ſeparately liable to the penalty impoſed by the act. For where an offence created or made penal by ſtatute, is in its nature ſingle, one ſingle penalty only can be recovered, although ſeveral join in committing it; but if the offence is in its nature ſeveral, each offender is ſeparately liable to the penalty. *Rex* v. *Clarke, Cowp.* 610.

10. A perſon can commit but one offence on the ſame day by exerciſing his ordinary calling on a *Sunday*, contrary to the ſtatute 29 *Car.* 2. *c.* 7. And if a juſtice of peace proceed to convict him in more than one penalty for the ſame day, it is an exceſs of juriſdiction, for which an action will lie before the convictions are quaſhed. *Crepps* v. *Durden, Cowp.* 640.

For more of *Penalty* in general ſee *Conditions, Covenant, Obligations,* and other proper titles.

Perjury. [G]

(A) At the Common Law. 16 Vin. 307.

1. AN action will lie for a *ſuppreſſio veri* in a return to a mandamus, as well as for an *allegatio falſi.* *The King* v. *Lyme Regis,* 1 *Dougl.* 156.

2. In *Miller's* caſe, 3 *Wilſ.* 427. 2 *Bl. Rep.* 881. Lord C. J. *De Grey* ſaid, it was a miſtake mankind had fallen into, that a

perſon cannot be convicted of perjury who ſwears that he *thinks* or *believes* a fact to be true, for that he certainly may, and it only renders the proof of it more difficult. And in the caſe of *The King* v. *Pedley*, *B. R. Trin.* term 1784, this opinion was confirmed by Lord *Mansfield*. *Caſes in Cr. Law*, 269. This queſtion was alſo agitated in the Common Pleas, *Mich.* term 1780, by Mr. Serjt. *Walker*, when Lord *Loughborough* and all the other judges were unanimous, that *belief* was to be conſidered as an abſolute term, and that an indictment might be ſupported upon it.

16 Vin. 311. (B) Puniſhable. How. At Common Law, and by Statute.

1. IF the defendant perjure himſelf in his anſwer in Chancery, the Exchequer-chamber, or the like, he is not puniſhable by the ſtat. 5 *Eliz.*, for it extendeth but to witneſſes: but he is puniſhable for the ſame by indictment at common law. 2 *Burr.* 1189. *per* Lord *Mansfield*.

2. By 31 *Geo.* 2. *c.* 10. *ſ.* 24. to take a falſe oath in order to obtain letters of adminiſtration to a ſeaman's effects is a capital offence.

3. Proſecutions upon the ſtat. 5 *Eliz. c.* 9. being more difficult than by indictment at common law, are very ſeldom brought, eſpecially at the ſeſſions: and at common law juſtices of the peace have no juriſdiction over the offence. 2 *Hawk. c.* 8. *ſ.* 38. *Stra.* 1088. The ſafer and moſt uſual mode therefore is by indictment at the aſſizes or in the King's Bench. 3 *Burn*, 294.

16 Vin. 313. (C) Puniſhable. In reſpect of the Court or Perſons, before whom.

1. IN the caſe of *The King* v. *Alford*, ſummer aſſizes for *Somerſet* 1776, the defendant was indicted for perjury in a cauſe tried at the aſſizes before Mr. Juſtice *Willes*. The caption of the indictment recited the names of the judges who were in the commiſſion, and charged, "That at the ſaid trial before the Hon. *Edward Willes*, *one of the juſtices* aforeſaid, the defendant took his corporal oath, &c. he the ſaid *Ed. Willes*, *then and there having competent authority to adminiſter an oath* to the defendant in that behalf." The priſoner was found guilty. But Mr. Baron *Eyre*, who tried the cauſe, doubted of the authority of *one commiſſioner* to adminiſter the oath; the record of *niſi prius* which was read in evidence ſtating, in the uſual form, that the trial was before both the judges; and therefore another doubt aroſe, whether the evidence maintained the indictment. On reference of the firſt *Hil.* term 1777, the judges were unanimous that either of the judges may adminiſter the oath; conſequently there was no variance, and the conviction good. *Caſes in Cr. Law*, 179.

2. *Qu.*

2. *Qu.* Whether a *falſe oath*, taken in Doctors Commons for the purpoſe of obtaining a *marriage licence*, is *perjury*. *Alexander's* caſe, *Caſ. in Cr. Law*, 74.

3. *Qu.* If any magiſtrate is juſtifiable in taking a voluntary affidavit in any extrajudicial matter. *Vide* 15 *Geo.* 3. *c.* 39. 3 *Burn*, 244.

4. Juſtices of aſſize (ſitting the court or within 24 hours after) may order a witneſs to be proſecuted for perjury, and aſſign counſel; and the proſecution ſhall be without tax, duty, or fee. By ſtat. 23 *Geo.* 2. *c.* 11.

(E) Puniſhable. In reſpect of its being a Thing material or not to the Iſſue. 16 Vin. 315.

1. IT is not neceſſary that it appear to what degree the point in which a man is perjured was material to the iſſue; for if it is but circumſtantially material, it will be perjury. 1 *Lord Raymond*, 258.

2. Much leſs is it neceſſary that the evidence be ſufficient for the plaintiff to recover upon; for in the nature of the thing an evidence may be very material, and yet it may not be full enough to prove directly the point in queſtion. 2 *Ld. Raym.* 889.

3. And it is incumbent on the proſecutor to prove the materiality of the perjury.

(I) Actions and Pleadings. 16 Vin. 321.

1. IN an indictment for perjury committed at an Admiralty Seſſion, where the commiſſion was directed to *A. B.* and *C.* and others not named, of whom *A. B.* and *C.* were, among others, *to be one*; the court will take it to mean, that if either of the perſons named of the *quorum* were preſent it would be ſufficient, ſtating that at ſuch a court *J. K. was in due form of law tried upon a certain indictment then and there depending* againſt him for murder; and that *at and upon the ſaid trial it then and there became and was a material queſtion*, whether, *&c.* are ſufficient averments that the perjury was committed on the trial of *J. K.* for the murder; and that the queſtion on which the perjury was aſſigned was material at the trial. *Rex* v. *Dowlin*, 5 *Term Rep.* 311.

2. An indictment for perjury aſſigned on an affidavit ſworn before the court, need not ſtate, nor is it neceſſary to prove, that the affidavit was filed of record, or exhibited to the court, or in any manner uſed by the party. *Rex* v. *Cropley*, 7 *Term Rep.* 311.

3. Perjury may be aſſigned upon the affidavit of an attorney of the court, made in anſwer to a charge exhibited againſt him in a ſummary way for having in his poſſeſſion blank pieces of paper with affidavit ſtamps and the ſignatures of a Maſter Extraordinary in *Chancery*, and another perſon at the bottom of the papers. *Ibid.*

4. It

4. It is no objection to such an indictment that it is not stated where the court was holden, where the original application was made, or when the rule was made, calling on the defendant to answer the charge, a sufficient inducement being laid to the fact of taking the false oath. *Ibid.*

5. To found an indictment for perjury, the requisite circumstances are these; the *oath must be taken in a judicial proceeding, before a competent jurisdiction, and it must be material to the question depending, and false.* *Rex* v. *Aylett*, 1 *Term Rep.* 69.

6. In the indictment there must be an allegation of *time* and *place*, which are sometimes material and necessary to be laid with precision and sometimes not. *Ibid.*

7. Where time is not material, it need not be positively averred, and if under a *videlicet*, may be rejected. *Ibid.* 70. (1).

8. It is not necessary to set forth in an indictment for perjury so much of the proceedings of the former trial as will shew the materiality of the question on which the perjury is assigned, it is sufficient to allege generally that the particular question became a material question. 5 *Term Rep.* 318. *Rex* v. *Dowlin.*

9. By the 23 *G.* 2. *c.* 11. The prosecutor need only set forth in the indictment the substance of the offence charged, and by what court, and before whom the oath was taken, (averring such court, *&c.* to have competent authority to administer the same,) and without setting forth the commission or authority of the court, *&c.*

10. But where the prosecutor in perjury undertakes to set out in the indictment more of the proceedings than he need under the stat. 22 *G.* 2. *c.* 11. he must set them forth correctly. 5 *Term Rep.* 317.

11. In an indictment for perjury at *common* law, the words "falsely, maliciously, wickedly, and corruptly," imply "wilfully." But on the 5 *Eliz. c.* 9. it must be expressly laid to have been *wilfully* committed. *Cox*'s case, *Cr. Cases*, 82.

12. An indictment for perjury, laying the offence to have been committed "at the *Guildhall* of the city of *London*," is bad, for the venue must be laid in some *parish* or *ward*. *Harris*'s case, 2 *Cr. Ca.* 928.

13. Perjury committed at the *Old Bailey*, on a trial before a *Middlesex* jury, is laid in and tried by a jury of the city of *London*. *Dougl.* 794.

14. On a conviction for perjury in an affidavit, exception was taken, that there appeared a material variance between the indictment and the affidavit; for in the affidavit the defendant swore that "he understood, and believed," *&c.* whereas the assignment of the perjury in the indictment was, that "he *undertood*, and believed," *&c.* omitting the letter *s*: when, *per* Lord *Mansfield*, "The true distinction seems to be taken in the case of *The Queen* "v. *Drake*, 2 *Salk.* 660. which is this, that where the omission "or addition of a letter does not change the word, so as to make "it another word, the variance is not material; in the present "case the omission of the letter *s* does not change the word, and "therefore

"therefore the jury were right in reading it underſtood." *Rex* v. *Beach*, 1 *Cowp.* 229.

15. Several cannot be joined in one indictment for perjury, it being a ſeparate act in each. *Rex* v. *Philips*, 2 *Stra.* 921.

(K) Proof.

16 Vin. 316.

1. ON an indictment for perjury in an anſwer in *Chancery*, it is ſufficient to prove the *jurat*, and that the name ſubſcribed is the hand-writing of the defendant. *Morris*'s caſe, 1 *Cr. Caſes*, 60. 2 *Burr.* 1189. 1 *Show.* 397.

2. On the ſtatute 31 *G.* 2. *c.* 10. *ſ.* 24. for taking a falſe oath to obtain adminiſtration to a ſeaman, in order to receive his wages, it is neceſſary to prove, directly and poſitively, that it was the priſoner who took the oath. *Rex* v. *Brady*, *Caſes in Cr. Law.* 368.

3. On the trial the oath will be taken as true till it be diſproved; and therefore to convict a man of perjury, a probable, credible witneſs is not enough, for the evidence muſt be ſtrong, clear, and more numerous on the part of the proſecution than the evidence on the other ſide. Therefore the law will not permit a man to be convicted of perjury, unleſs there are two witneſſes at leaſt. *Naylock*'s caſe. *Old Bailey*, 1786.

4. Nor ſhall the party prejudiced by the perjury be admitted as a witneſs to prove it on an indictment on the ſtatute, becauſe the ſtatue gives him ten pounds; but in an indictment for perjury at common law, the party injured may be a witneſs. 2 *Hawk.* 433.

5. In perjury on an affidavit before a commiſſioner, his authority need not be proved. *Buller's Ni. Pri.* 238. 1 *Show.* 397. 1 *Dougl.* 151. 1 *Term Rep.* 69.

6. On an indictment for perjury a *copy* of an anſwer in Chancery may be offered to, and be ſufficient to warrant the grand jury to find the bill, but on the trial *the original muſt be produced*, and poſitive proof given that the defendant was ſworn to it. *Bull. Ni. Pri.* 239.

7. On an indictment for perjury againſt a witneſs for what he ſwore at the trial, the *poſtea* is good evidence that there was a trial, ſo as to introduce the words ſpoken, on which the perjury is aſſigned. 2 *Eſp. Ni. Pri.* 749.

8. In perjury, the *capias*, warrant, and affidavit, are good evidence that a cauſe was depending. 1 *Show* 397.

9. It is material for the proſecutor of an indictment for perjury to prove what is alleged in the indictment, *viz.* that the facts that were the ſubject of ſuch indictment were material to the cauſe upon the trial, on which the perjury was ſuppoſed to be commited. *H. B. Trials for* 1783 & 1784, *p.* 305. *Vide James*'s caſe, *O. B.* 1784. No. 228.

10. *Per*

10. *Per* Lord *Mansfield.* A *conviction* upon a charge of perjury is not ſufficient to diſqualify a man to be a witneſs, unleſs followed by a *judgment:* I know of no caſe where a conviction alone has been an objection, becauſe upon a motion in arreſt of judgment it may be quaſhed. 1 *Cowp.* 3.

11. *Per curiam.* "In the crime of *perjury* the law requires "two witneſſes to convict, even on a diſtinct aſſignment of per- "jury: and the law does not leave it to the jury to determine "whether they will believe one witneſs or the other, where "there is but one each way, becauſe the perſon indicted for "perjury has already ſworn one way, and if there is but one "witneſs that ſwears the other way, the law will not ſuffer the "perſon indicted to be convicted." *Ledwick's* caſe, *O. B.* 1788. *Vide Rex* v. *Broughton,* 2 *Stra.* 1228.

12. In an indictment for perjury, Lord *Kenyon* C. J. held, that the defendant in the original action, againſt whom the verdict went, was an incompetent witneſs, he not having paid the debt and coſts. *Rex* v. *Eden,* 1 *Eſpinaſſe's Rep.* 97.

[G]
18 Vin. 336.

Perſonating.

1. BY 4 & 5 *Will. & Mary, c.* 4. Whoever ſhall perſonate another before commiſſioners authorized to take bail, ſo as the perſonated may become liable, ſhall be guilty of felony. See alſo 21 *Jac.* 1. *c.* 26.

2. It ſeems that if bail be put in in the names of perſons who have no exiſtence, the offender cannot be proſecuted upon the ſtat. 21 *Jac.* 1. *c.* 26. in having perſonated bail, but the court may order him to be ſet on the pillory for the miſdemeanor. *Anon.* 1 *Stra.* 384.

3. By 8 *G.* 1. *c.* 22. 9 *G.* 1. *c.* 12. 31 *G.* 2. *c.* 22. and 4 *G.* 3. *c.* 25. Whoever ſhall perſonate a proprietor of any of the public ſtocks or funds, thereby endeavouring to receive any dividend or annuity of ſuch proprietor, as if he were the true proprietor, or who ſhall aſſiſt or aid therein, ſhall ſuffer death without benefit of clergy.

4. It has been determined on the ſtat. 33 *G.* 3. *c.* 30. that obtaining and indorſing a dividend warrant at the bank of *England,* in the name of a ſtock holder, is perſonating a proprietor, and *thereby* endeavouring to receive the dividend, although no attempt whatever is made to receive the money at the pay-office. *Parr's* caſe, *Caſ. in C. L.* 487.

5. By 31 *G.* 2. *c.* 10. Whoever ſhall perſonate the name or character of any ſeaman, or other perſon entitled to wages, or other

other monies for ſervices on board any of the king's ſhips, or the executor, adminiſtrator, wife, relation, or creditor of ſuch perſon, in order to receive the monies ſo due to him, ſhall ſuffer death without benefit of clergy.

Petitions in Chancery.

(B) *What may be done upon* a Petition *without a Bill.*

16 Vin. 337.

A Decree gained by fraud may be ſet aſide by petition, as well as a judgment at law by a motion. 3 *P. Wms.* 111. 1731. *Sheldon* v. *Forteſcue Aland. Sed Vide Muſſel* v. *Morgan*, 3 *Bro. Ch. Rep.* 74. *contrà.*

(C) *What is to be done in caſe an Order is made* upon the Petition.

16 Vin. 338.

1. THE court of Chancery, upon petition, may allow maintenance for an infant where no cauſe is depending. 2 *Atk.* 315. 1742. *Ex parte Whitfield.* See alſo 2 *Atk. ante* 14. 1737. *Melliſh* v. *De Coſta*, and 3 *Bro. Ch. Rep.* 88. 1790. *Ex parte Kent.*

2. A guardian to an infant may be appointed, on petition, though no cauſe depending. 3 *Atk.* 813. 1754. *Ex parte Birchell.*

3. Petition to confirm the Maſter's report of maintenance and for *coſts*, which the court granted, though no ſuit was depending. *Ambl.* 446. 1752. *Ex parte Thomas.*

4. Guardian may be appointed and maintenance allowed, upon petition, without ſuit. 3 *Bro. Ch. Rep.* 500. 1792. *Ex parte Salter.*

5. Petition by aſſignees of a bankrupt partnerſhip for an order upon a mortgagee, whoſe title was affected by the bankruptcy, to deliver up the title deeds, and all deeds relating to this eſtate, but the petition was diſmiſſed. 1 *Veſ. jun.* 160. 1790. *Ex parte Poole.*

6. Timber on a lunatic's eſtate was cut and ſold under an order of court, and the produce paid into the bank; on *petition*, the court refuſed to give the produce either to the heir or next of kin, without a bill, on account of the difficulty of reverſing an order made upon petition. 1 *Veſ. jun.* 453. 1792. *Ex parte Bromfield.*

Piſcary.

(B) In what Place.

16 Vin. 354.

1. IN rivers not navigable the proprietors of the land have the right of fiſhery on their reſpective ſides; and it generally extends *ad filum medium aquæ.*

2. But in navigable rivers the proprietors of the land on each ſide have it not; the fiſhery is common; *it is prima facie* in the king, and is public.

3. If any one claims it excluſively, he muſt ſhew a right. If he can ſhew a right by preſcription, he may then exerciſe an excluſive right, though the preſumption is againſt him unleſs he can prove ſuch a preſcriptive right.

4. A right therefore "to have an excluſive privilege of fiſhery, although it be an arm of the ſea," ſhall not be preſumed, but the contrary *prima facie.* But it is capable of being proved. *Per* Lord *Mansfield*, aſſent. cur. in *Carter & al.* v. *Murcot & al.* 4 *Burr.* 2162.

(C) *The ſeveral Sorts of Fiſheries, and what is a ſeveral Piſcary.*

1. TO conſtitute a ſeveral fiſhery it is requiſite that the party claiming it ſhould ſo far have the right of fiſhing independent of all others, as that no perſon ſhould have a co-extenſive right with him in the ſubject claimed, (for where any perſon hath ſuch co-extenſive right, there is only a *free fiſhery*;) but a partial or independent right in another, or a limited liberty does not derogate from the right of the general owner. Therefore in treſpaſs for diſturbing the plaintiffs' *ſeveral fiſhery*, a grant of the fiſhery from Lord C. with the exception of an oyſtery, and a reſervation of a right to the grantor to take fiſh for the ſupply of his own table, is a ſufficient proof of their title. *Seymour & al.* v. *Lord Courtinay*, 5 *Burr.* 2814.

2. In this laſt caſe the court gave no opinion, whether there can be a ſeveral fiſhery without the ownerſhip of the ſoil. *Vide* alſo *Kinnerſly* v. *Orpe & al. Dougl.* 56.

3. Mr. *Hargrave*, in a very learned note on the paſſage cited out of *Co. Lit.* 122. *a.* in *Smith* v. *Kemp*, 2 *Salk.* 637. and *Vin. Abr. vol.* 16. (C), is of opinion that a ſeveral fiſhery may be granted

granted without the ſoil; but that it is preſumed to comprehend the ſoil, till the contrary appears. *Vide Harg. & Butl. Co. Lit. note 7 to 122. a.*

(E) Actions and Pleadings.

1. TRESPASS for cutting plaintiff's nets and taking his fiſh. Defendant juſtifies as *water-bailiff* of the *Thames* under the king's letters patent, and that the plaintiff was fiſhing with unlawful nets, contrary to 1 *Eliz. c.* 17. On demurrer, judgment for the plaintiff; for this being an offence contrary to a penal act of parliament, the puniſhment muſt follow the method which that act preſcribes, and a violation of a public penal ſtatute, is not a nuſance, or abateable as ſuch. *Bulbrook* v. *Sir Robert Goodere & al.*, 3 *Burr.* 1768. 1 *Black.* 569.

The ſtatute prohibits the taking with particular nets or tramels therein ſpecified, under forfeiture of a pecuniary ſum, and of the fiſh ſo taken, and alſo of the unlawful engines.

2. Debt by the owner of a fiſhery for a penalty of 5*l.* under 5 *Geo.* 3. *cap.* 14. *ſ.* 3 & 4. for killing fiſh in his fiſhery. The defendant was ſervant to Doctor *C.*, who claimed a right to fiſh there, and he fiſhed there, in conſequence of a notice given by Doctor *C.* to the plaintiff, that he would order a ſervant to fiſh there for the purpoſe of giving occaſion to an action to try the right. Held *per cur.* that he is not liable to the penalty, but within the exception of the act. *Kinnerſley* v. *Orpe*, *Dougl.* 499.

3. To treſpaſs for fiſhing in the plaintiff's fiſhery, defendant pleaded that the place is an arm of the ſea, in which every ſubject has a right to fiſh. The plaintiff in his replication claimed an excluſive right by preſcription, traverſing the general right; held, that the defendant ought to take iſſue on the traverſe, and ought not to traverſe the preſcriptive right claimed by the plaintiff; for the firſt traverſe is a material one, and will put in iſſue the true queſtion in diſpute between the parties. *Mayor and Commonalty of Oxford* v. *Richardſon & al.*, 4 *Term Rep.* 437. But reverſed in *Cam. Scac.*, 5 *Term Rep.* 367.

Plea and Demurrer.

(A) Plea and Demurrer in Equity. Notes.

16 Vin. 161.

1. BILL to be relieved againſt ſeveral contracts entered into by the plaintiff with the defendants, relating to ſhares in a bubble called the *Pennſylvania* bubble, and to have his money repaid,

paid, which he had paid to the defendants for ſhares ſold by them reſpectively, and charges that the defendants had formed themſelves into a ſociety to carry on the fraud; the defendants demurred, becauſe the bill contained ſeveral and diſtinct charges againſt ſeveral and diſtinct defendants. Demurrer allowed. *Nota*, they denied combinations as is neceſſary upon ſuch a demurrer. *Bunb.* 69. 1720. *Bull* v. *Allen.*

2. A demurrer lies to an amended bill, though an anſwer has been filed to the original bill. *Bunb.* 120. 1722. *Lowther* v. *Whorwood.*

3. A defendant cannot demur and plead to the ſame part of a bill; for the plea overrules the demurrer. 3 *P. Wms.* 80. *Mich.* 1730. *Jones* v. *Earl of Strafford and others.*

4. On time given to anſwer, defendant may put in a plea, for that is an anſwer, and upon oath. *Ibid.*

5. A defendant in his plea of a purchaſe for a valuable conſideration, omits to deny notice; if the plaintiff replies to it, all the defendant has to do, is to prove his purchaſe; and it is not material, if the plaintiff proves notice; for it was the plaintiff's own fault that he did not ſet down the plea to be argued, in which caſe it would have been overruled. 3 *P. Wms.* 94. *Hil.* 1730. *Harris* v. *Ingledew.*

6. The defendant pleads to the whole bill, and on arguing the plea, it was ordered to ſtand for an anſwer, without ſaying one way or other, whether the plaintiff might except: the plaintiff cannot except, for that the court in ſaying the plea ſhould ſtand for an anſwer, muſt be intended to have meant a ſufficient anſwer; an inſufficient anſwer being as none. 3 *P. Wms.* 240. 1733. *Sellon* v. *Lewin.*

7. If the defendant's time for anſwering be out, the court will order proceedings to be revived. So though the defendant by his anſwer inſiſts that the plaintiff is not entitled to revive; for this ought to be ſhewn either by plea, or demurrer; but if in ſuch caſe it appears at the hearing that the plaintiff had no title to revive, he cannot have a decree. 3 *P. Wms.* 1734. *Harris* v. *Pollard.*

8. After a plea put in, there can be no motion for an injunction till the plea is argued. 3 *P. Wms.* 397. *Sir Wm. Humphreys* v. *Orlando Humphreys.*

9. A plea may be good in part and bad in part. 1 *Atk.* 53. 1737. *Duncalf* v. *Blake*, 2 *Atk.* 44. 1740. *Higgins* v. *York-Buildings Company*, 2 *Atk.* 283. *Dolmer* v. *Forteſcue*, S. P. 2 *Atk.* 387. *Baker* v. *Prichard*, S. P. 2 *Veſ.* 205.

10. Where a defendant pleads a decree of diſmiſſion of a former cauſe, for the ſame matters, in bar of the plaintiff's demand on his new bill, if the plaintiff does not apply to the court, that it may be referred to a Maſter to ſtate whether there be ſuch a decree, but ſets down the cauſe upon the new bill for hearing, it is a waiver of his right of application for ſuch reference, and the court will determine it. 1 *Atk.* 53. 1738. *Morgan* v. *Morgan.*

10. The

11. The defence proper for a plea must be such as reduces the cause, or some part of it, to a single point, and from thence creates a bar to the suit. The end of a plea is to save to the parties the expence of an examination of witnesses *at large*; and therefore it is not every good defence in equity, which is good as a plea; for where the defence consists of a variety of circumstances, there is no use of a plea; as the examination must still be at large, and the effect of allowing such a plea will be, that the court will give judgment on the circumstances of the case before they are made out by proof. 1 *Atk.* 54. 1739. *Chapman* v. *Turner.*

12. Where a bill is brought for new matter discovered since the hearing, a defendant, if he can shew that there is no new matter, must take advantage by plea, or demurrer, for it is too late to insist upon it at the hearing. 2 *Atk.* 40. 1740. *Lewellen* v. *Mackworth.*

13. A plea must first be removed out of the way before a plaintiff can have an injunction to stay proceedings at law. 2 *Atk.* 113. 1740. *Anon.*

14. Whoever comes into equity for an account of rents and profits, prays a discovery as incident to it; and for that reason a defendant cannot demur and plead to the same matter. 2 *Atk.* 288. 1741-2. *Dormer* v. *Fortescue.*

15. Exceptions cannot be taken to an answer whilst a plea is depending, for that must first be removed out of the way. 2 *Atk.* 390. 1742. *Baker* v. *Pritchard.* 2 *Atk.* 395.

16. In the plea of an alien there must be an averment that the person was an alien, or else it is no bar. 2 *Atk.* 397. 1742. *Burk* v. *Brown.*

17. In a plea of conviction for a capital offence, the court of Chancery must judge with equal strictness, as if it were a plea at common law, saying that *A.* gave a mortal wound to *B.* of which he died, without mentioning in what part *B.* received the wound, is bad. So, saying that *A.* was tried at *Galway* assizes, without averring, that the persons who tried him had a commission of gaol delivery, is also bad; for in the plea the jurisdiction ought to be set forth, and that they had a right to try it, or it will not be strong enough to forfeit personal estate. 2 *Atk.* 399. 1742. *Burk* v. *Brown.*

18. One partner brings a bill against another to discover and be relieved against frauds, *&c.* the defendant pleaded an agreement, that in case any difference should arise between them, it was to be referred; and that the matters in the plaintiff's bill relate only to the partnership, and yet have never been submitted to arbitration, nor has he ever proposed a reference, though the defendant offered, and was always ready to do it. Lord *Hardwicke* disallowed the plea: for as it was a bill to discover and be relieved against frauds, the arbitrators cannot examine on oath, which, by the agreement, they should have had a power of doing. 2 *Atk.* 569. 1743. *Wellington* v. *Mackintosh.*

19. Plea to a bill to ſet aſide a will for fraud, and for a receiver, allowed as to the firſt part; but as to the receiver diſallowed. 3 *Atk.* 17. 1743. *Anon.*

20. A plea of a foreign ſentence over-ruled, being in a commiſſary court only, which is of a political nature for determining diſputes relating to *French* actions. 3 *Atk.* 215. 1744. *Gage* v. *Bulkeley.*

21. The defendant, as to ſo much of the bill as ſought to diſcover whether after inſtitution, *&c.* to *A.* he was preſented to two other livings, and inſtituted, *&c.* demurred, as ſuch diſcovery tends to ſhew an avoidance of *A.*, the demurrer allowed, becauſe he is not obliged by a diſcovery to ſubject himſelf to a forfeiture, or any thing in the nature of a forfeiture. 3 *Atk.* 453. 1746. *Boteler* v. *Arlington.*

22. Where a man pleads hiſtorically only, and upon his memory, without any averment or certainty, the plea is bad. 3 *Atk.* 590. 1747. *Foſter* v. *Vaſſall.*

23. To a bill againſt an arbitrator ſeeking a diſcovery of the grounds upon which he made his award, he pleaded in bar, that he was not obliged to ſet them forth; plea allowed. 3 *Atk.* 644. 1848. *Anon.*

24. Where a plea is to the relief only, and is directed to ſtand for an anſwer; the words *with liberty to except*, muſt be added to prevent the eſtabliſhing it as a good anſwer. 3 *Atk.* 814, 1754. *Maitland* v, *Wilſon.*

25. Plea of the ſtat. of frauds to the diſcovery of a parol agreement, not allowed where there is a part performance. 1 *Veſ.* 297. 1749. *Taylor* v. *Beech.*

26. On a plea to the juriſdiction, it muſt be ſhewn what other court has juriſdiction. 1 *Veſ.* 202. 1748-9. *Earl of Derby* v. *Duke of Athol.* 2 *Veſ.* 357.

27. A demurrer is a dilatory, a plea not. 1 *Veſ.* 247. 1749. *Eaſt India Company* v. *Campbell.* No ſecond matter may be inſiſted on by anſwer. 2 *Veſ.* 492. 1752. *Finch* v. *Finch.*

28. One merely a witneſs cannot be made a defendant for a diſcovery of what he is examinable to, unleſs intereſted, but he ought to plead thereto, and ſupport it by an anſwer diſclaiming intereſt, and not demur. 3 *Atk.* 426. 1749-50. *Plummer* v. *May.*

29. Defendant may plead to diſcovery of the act cauſing forfeiture; but not to the diſcovery of the eſtate, as whether he is tenant for life or not. 2 *Veſ.* 108. 1750. *Weaver* v. *Earl of Meath.*

30. Plea to the diſcovery of a marriage, as it would ſubject to puniſhment for inceſt in the eccleſiaſtical court, though one party was dead, allowed. 2 *Veſ.* 243. 1750. *Brownſword* v. *Edwards.*

* *In a plea it is proper to introduce facts and averments to ſupport it, whereas a demurrer can be to nothing which is not upon the face of the bill.* Ibid. *Averments are neceſſary to exclude intendments which would be made againſt the pleader, for the court will always intend the matters charged againſt the pleader, unleſs fully denied.* 2 Atk. 241.

31. The

31. The putting in a *plea* is a ſufficient compliance with an order for time to *anſwer*. 1 *Bro. Ch. Rep.* 56. 1779. *Roberts* v. *Hartley*.

But in the above caſe, the plea appearing to be for delay, it was ordered to be argued the next day; and being a plea of a ſentence of the Court of Admiralty, which was recited in the bill, and therefore bringing no new matter before the court, it was overruled. Ibid.

32. Plea of the ſtat. of frauds, averring, firſt, that there was no agreement in writing; and 2dly, That there was no part performance of ſuch agreement, is a double plea; ordered to ſtand for an anſwer, with liberty to except. 1 *Bro. Ch. Rep.* 404. 1784. *Whitbread* v. *Brockhurſt*.

33. Plea to a bill of revivor, that it was for coſts only; the coſts having been ordered to be paid into the bank, plea overruled. 1 *Bro. Ch. Rep.* 438. 1785. *Hall* v. *Smith*.

34. A plea may be amended, where there is a ſlip, if the material ground of defence appears ſufficient, but not otherwiſe. 2 *Bro. Ch. Rep.* 143. 1787. *Newman* v. *Wallis*.

35. Plea that *Gray's Inn* is a voluntary ſociety, governed by benchers, ſubject to appeal to the judges, a good plea to a bill relative to the renewal of a leaſe of chambers. 2 *Bro. Ch. Rep.* 241. 1787. *Cunningham* v. *Wegg and others*.

36. Plea of the ſtat. of frauds, the agreement not being in writing, allowed, though a parol agreement was confeſſed in the anſwer. 2 *Bro. Ch. Rep.* 559. 1789. *Whitchurch* v. *Bevis*.

37. Plea of payment of a ſum of money into the eccleſiaſtical court to prevent a commiſſion of appraiſement, and accepted, and a receipt given, diſallowed as a plea in bar to the ſuit, as it does not ſhew that the party had no further demand. 3 *Bro. Ch. Rep.* 70. 1790. *Sumuda* v. *Furtado*.

38. Defendants to a bill of revivor cannot plead to that ſuit a plea which had been pleaded to the original bill, and over-ruled. *Ibid.*

39. Plea of the ſtatute of frauds over-ruled, the contract being executory. 3 *Bro. Ch. Rep.* 154. 1790. *Rondeau* v. *Wyatt*.

40. Plea of the ſtatute of frauds over-ruled where the contract was acknowledged by letter. 3 *Bro. Ch. Rep.* 161. 1790. *Tawney and another* v. *Crowther*.

41. Plea of the ſtat. of frauds allowed where a written agreement has been eſſentially varied by parol. 3 *Bro. Ch. Rep.* 372. 1791. *Jordan* v. *Sawkins*. 1 *Veſ. jun.* 402. S. C.

42. Plea over-ruled, one part being inconſiſtent with the other; but leave was given to withdraw it, and plead *de novo*. 4 *Bro. Ch. Rep.* 253. 1793. *Nobkiſſen* v. *Haſtings*. 2 *Veſ. jun.* 84.

43. Plea to a bill of diſcovery as to a ſpecific performance, and for an injunction; an agreement at law, that the defendant, then plaintiff, would not bring error for delay, or file a bill for an injunction, a bad plea; but the court, after ſuch an agreement, will not grant an injunction as to that ſuit. 4 *Bro. Ch. Rep.* 498. 1794. *Anth* v. *Sambourne*.

44. Plea to the jurisdiction must shew another jurisdiction; for a plea to the jurisdiction of all courts is absurd, because the same is a plea in bar. *Nabob of Arcot* v. *East India Company*, 1 *Ves. jun.* 372. 1791.

45. Every plea must tender issuable matter, upon the truth or falsehood of which it is to be decided. *Ibid.* 393.

46. After plea set down, an order was obtained of course by plaintiff to amend the bill, and served on the defendant; plaintiff not appearing when the plea came on to be argued, it was allowed of course with costs. 1 *Ves. jun.* 447. 1792. *Jennings* v. *Pearce.*

47. Where a plea is a bar to the whole bill, if at all, an answer to any matters which might have been covered by the plea, over-rules it. 1 *Anstr.* 14. *East.* 32 *G.* 3. *Blacket* v. *Langlands.*

48. Where the bill charged an award to have been obtained corruptly, a plea setting up the award, and denying the specific charges of fraud, is bad, as not bringing the cause to one point, an answer to the same charges over-rules the plea. 1 *Anstr.* 59. *Trin.* 32 *G.* 3. *Pope* v. *Bish.* See *Edmondson* v. *Hartley.* *Ibid.* 97.

49. Bill by an insolvent debtor against his assignees, and a creditor to his estate, charging collusion: plea that the plaintiff had been discharged under the insolvent act (without shewing that all the requisites had been complied with,) and denying collusion, was held good. 1 *Anstr.* 101. *Mich.* 33 *G.* 3. *Bowser* v. *Hughes and others.*

50. The plea was over-ruled on the ground of form. The defendant pleaded the same matter again more formally. This is irregular. *Anstr.* 407. *Hill.* 34 *G.* *Freeland* v. *Johnson.*

51. A submission to arbitration was made a rule of court, and an award made; the bill stated the award to have been obtained by misrepresentation of facts not then known to the plaintiff; plea the award alone, and no answer; plea bad. *Anstr.* 735. *Trin.* 36 *G.* 3. *Gartside* v. *Gartside.*

52. A plea stating that the plaintiffs, who claimed as citizens of *London*, never were resident there, or paying scot and lot, and that they were admitted freemen by fraud, for the purpose of enjoying a certain exemption, is bad for duplicity. *Anstr.* 738. *Trin.* 36 *G.* 3. 739.

16 Vin. 361.

(B) To Bills of Account.

1. A Bill for an account against the representative of an *East India* Governor, who pleaded that the plaintiff was an alien born, and an alien infidel, and could have no suit here; plea over-ruled, for being a *mere* personal demand, the plaintiff may bring a bill in this court. 1 *Atk.* 51. 1737. *Ramkissent* v. *Barker.*

2. Where there is a plea of a stated account to a bill brought for a general one, the plaintiff must amend. 1 *Atk.* 1. 1736. *Sumner* v. *Thorpe.*

3. Plea

3. Plea of a ſtated account is bad, unleſs it ſhews that the account was in writing, and what the balance was. 2 *Atk.* 399. 1742. *Burk* v. *Brown.*

4. A plea of a ſtated account, as to all matters before accounted for, is bad; it ſhould aver that it is juſt and true to the beſt of the defendant's knowledge and belief. 3 *Atk.* 70. 1743. *Anon.*

5. A defendant is not obliged to ſet out the account between him and the plaintiff, after an award in his favour relating to that account, for a plea of an award is good, not only to the merits, but to the diſcovery. 3 *Atk.* 530. 1747. *Tittenſon* v. *Peat.*

6. Plea that pending ſuit the parties came to a compromiſe. Plea good. 1 *Veſ.* 297. 1749. *Sewel* v. *Bridge.*

7. Plea to a bill for an account of a partnerſhip, that all matters in controverſy were to be determined by arbitration; allowed. 2 *Bro. Ch. Rep.* 336. 1788. *Halfhide* v. *Fenning.*

8. Plea of an award and releaſe to a bill to open an account ordered to ſtand for an anſwer. 3 *Bro. Ch. Rep.* 196. 1791. *Burton* v. *Ellington.*

9. Plea by the *Eaſt India* Company to a bill for an account filed by the Nabob of *Arcot*, that by charter confirmed by parliament, they had certain powers, by virtue of which the acts were done, over-ruled; it not ſetting forth the contents of the charters and acts of parliament. 3 *Bro. Ch. Rep.* 292. 1791. *Nabob of Arcot* v. *Eaſt India Company.* 4 *Bro. Ch. Rep.* 180. 1 *Veſ. jun.* 372. S. C. 2 *Veſ. jun.* 56.

10. Plea, to a bill for diſcovery of frauds in breach of articles, that there was a clauſe in the articles, that all matters in difference ſhould be referred to arbitration, but not ſtating a reference to be depending or to have been had, over-ruled. 4 *Bro. Ch. Rep.* 312. 1793. *Michell and others* v. *Harris.*

11. Defendant, to a bill for diſcovery and account, objecting by anſwer, that he had no concern in the buſineſs, muſt anſwer fully, though ſuch a plea would bar both diſcovery and relief. 1 *Veſ. jun.* 292. *May* 1791. *Cartwright* v. *Hateley.*

12. On a bill for an account after an award, on the ground of matters ſtated not to have been comprehended in it, it muſt appear clearly that the award is not final, otherwiſe a plea of the award is good. 3 *Anſtr.* 637. *Mich.* 36 *G.* 3. *Routh* v. *Peach.*

(C) To Bills of Diſcovery of perſonal Things.

16 Vin. 563.

1. *A.* by his will made ſeveral proviſions for his wife, which *B.* his ſon and heir, after his death, filed a bill againſt her to ſet aſide; alleging, that ſhe was never married to his father, or if ſhe was, that ſhe had been previouſly married to *P.*, who was ſtill living. To all the charges in this bill, except what related to her marriage with *P.*, the defendant anſwered; but as to that ſhe pleaded her marriage with the teſtator, and cohabiting with him as his wife, and that ſhe had a ſon by him, who was ſtill living;

and therefore inſiſted that ſhe was not compellable to anſwer the matter of the marriage with *P.* as it tended to criminate and make her guilty of bigamy, which is felony. Plea allowed. 3 *Bro. Par. Ca.* 65. 1725. *Hatfield* v. *Hatfield.*

2. Bill for a diſcovery of perſonal eſtate againſt an adminiſtrator, and for a diſtribution; defendant in his anſwer ſets forth the perſonal eſtate, but as to the diſtribution pleads, that the inteſtate died but in *March* laſt, and therefore by the ſtat. 22 *Car.* 2. he was not obliged to a diſtribution until the year was expired: but by the opinion of the Lord Chief Baron, *Price & Page* Barons, the plea was over-ruled, and ordered to ſtand for an anſwer, with liberty to except; *Montague*, Baron, *diſſentiente. Bunb.* 64. 1720. *Hart* v. *King.*

3. Plea to diſcovery and relief in a bill, which only prayed diſcovery, over-ruled. *Bunb.* 70. 1720. *Aſgill* v. *Dawſon.*

4. If to a bill the defendant anſwers as to matter of diſcovery, and pleads only as to relief, the plaintiff may except as to any matters of diſcovery before the plea argued; for that plainly no matter of diſcovery is covered by the plea. 3 *P. Wms.* 326. *Trin.* 1734. *London Aſſurance* v. *Eaſt India Company, in notis.*

5. An inſurer by his bill ſuggeſts the ſhip was loſt fraudulently, and in the charging part mentions, that inſtead of proper goods, there was only wool on board, and in the interrogating part prays defendant may ſet out *what kind of goods he had on board*; defendant pleads ſeveral ſtatutes, which make it penal to export wool, in bar to a diſcovery of all kinds of goods on board: the plea was allowed, becauſe no goods, but wool, were mentioned in the charging part; if there had, the defendant muſt have anſwered. 1 *Atk.* 52. 1737. *Duncalf* v. *Blake.*

6. Bill filed to diſcover articles pawned to defendant; he pleads that he lent money without notice of plaintiff's claim; the plea ſhould aver, that he has no other articles than thoſe ſpecified; and although this was ſworn in the anſwer, it is not ſufficient. 1 *Bro. Ch. Rep.* 578. 1785. *Hoare* v. *Parker.*

7. Plea of the ſtock jobbing act, to a bill for a diſcovery of ſtock jobbing tranſactions, over-ruled. 3 *Bro. Ch. Rep.* 11. 1789. *Bancroft* v. *Wentworth.*

8. Plea to a bill of diſcovery in ſupport of an action under ſtat. 9 *Anne, c.* 14. for money loſt at play, by the aſſignees of the loſer, a bankrupt, that the action was not commenced and the bill exhibited within *three months*, over-ruled. 2 *Veſ. jun.* 514. *Brandon* v. *Sands.* 1794.

9. Plea of alien enemy to a bill of diſcovery, good. *Anſtr.* 462. *Trin.* 34 *G.* 3. *Daubigny* v. *Davallon.*

10. A plea, averring this nation to be at war with *France*, and that the plaintiffs are *Frenchmen*, aliens, and enemies of the king, is good. *Ibid.*

(D) To Bills of Diſcovery of Titles.

16 Vin. 364.

1. PLEA of a fine and long poſſeſſion under it, is not a good bar to a bill brought for a diſcovery of the deed, declaring the uſes of ſuch fine. 4 *Bro. Par. Caſ.* 253. 1736. *Sir Liſter Holt* v. *Lowe.*

2. Lands deviſed to be ſold for payment of debts; bill by a creditor of the teſtator againſt his widow to diſcover her title to lands in her poſſeſſion: ſhe pleads a ſettlement and jointure, and offers to diſcover, if plaintiff will confirm it, but neither ſets out the date nor lands contained in the ſettlement: the plea was overruled, for ſhe ought to have ſet forth both thoſe matters. 1 *Atk.* 52. 1735. *Chamberlain* v. *Knapp.*

3. A bill was brought to diſcover, whether *A.*, under whoſe will the defendant claims, was a papiſt at the time of a purchaſe made by *A.* of the eſtate from the plaintiff's anceſtor. Defendant pleads as to the diſcovery the ſtatute 11 & 12 *Will.* 3. by which, if *A.* was a papiſt, ſhe was diſabled to take. Under the rule, a man is not obliged to accuſe himſelf, is implied, that he is not to diſcover a diſability in himſelf; and as *A.* would not have been obliged to diſcover, the defendant, who claims under the ſame title, is entitled to the ſame privilege, and takes the eſtate under the ſame circumſtances. The plea was allowed. 1 *Atk.* 526. 1736-7. *Smith* v. *Read.*

4. The bill ſeeks a diſcovery of the defendant *Moreland*, whether *Southcote* was not a perſon profeſſing the popiſh religion before he conveyed the freehold and copyhold eſtate to the defendant, in the bill mentioned, as a purchaſer thereof. Plea of the ſtat. 11 & 12 *Will.* 3. for preventing the growth of popery, ſo far as it goes to the diſcovery whether *Southcote* was a papiſt, allowed. 1 *Atk.* 528. 1751. *Harriſon* v. *Southcote and another.*

5. A plea of a bare title only, without ſetting forth any conſideration, will not protect a defendant from giving an anſwer to the title ſet up by the plaintiff. 2 *Atk.* 241. 1741. *Brereton* v. *Gamul.*

6. Bill by plaintiff claiming by conveyance from his wife, who was one of the heirs at law of *John Drew*, for an account, &c. The title ſet up by the bill was, that *John Drew* was ſeiſed of a ſmall eſtate at the *Devizes*, and died inteſtate in 1737, leaving plaintiff's wife and two of the defendants his heirs at law; that is, the two defendants and plaintiff's mother were the children of *Robert*, the nephew of *John Drew*; and that plaintiff's wife, before marriage, and in conſideration of a ſettlement conveyed to plaintiff in fee; the defendant *Garth* pleaded a title under *Robert*, the nephew of *John*, and grandfather of plaintiff's wife; that *Robert* being, or pretending to be ſeiſed of the eſtate in fee after the death of *John Drew*, conveyed for 300*l.* to *Fowler*, and then ſets out ſeveral conveyances afterwards, ſo as to bring the eſtates into himſelf

ſelf in 1747. Lord *Henley*, Chancellor, over-ruled the plea, becauſe it did not ſet out *how Robert* became entitled to the reverſion, which it ought to do, being a title to a particular eſtate, and *Robert* not in poſſeſſion at the time of the conveyance. *Ambl.* 422. 1762. *Hughes* v. *Garth.*

7. Plea that a writ of right had been tried and determined againſt the plaintiff (who was demandant in the writ of right); a good plea to the diſcovery of the defendant's title. 1 *Bro. Ch. Rep.* 305. 1783. *Earl of Leiceſter* v. *Perry.*

8. Plea that the plaintiff is *not heir*, where he had deduced his title as ſuch, is bad: the title ought to be denied, as explicitly as it is laid. 2 *Bro. Ch. Rep.* 143. 1787. *Newman* v. *Wallis.*

9. Plea of a conveyance, fine, and nonclaim is not multifarious, but a good plea to a bill impeaching the conveyance, as not being for valuable conſideration. 2 *Bro. Ch. Rep.* 274. *Doble* v. *Credland.* 1787.

10. To a charge in the bill that *A.* died ſeiſed in fee of eſtates in *Derbyſhire* and elſewhere, plea of a fine of all the eſtates charged in the bill, and of which *A.* died ſeiſed in fee, ſufficient without averments that they were in *Derbyſhire* and none elſewhere. 1 *Veſ. jun.* 136. 1790. *Butler* v. *Every.* 3 *Bro. Ch. Rep.* 80. S. C.

11. Bill of foreclosure as to a meſſuage and forty acres of land; plea deducing a title to the premiſes, and ſtating them to be a *meſſuage and tenement.* The plea is bad, as not relating to the land demanded. *Anſtr.* 633. *Mich.* 36 *G.* 3. *Wedlake* v. *Hutton.*

16 Vin. 366.

(E) To Bills of Diſcovery. Want of Parties.

1. A Plea for not bringing the repreſentatives of the perſonal eſtate before the court, allowed; the bill being only againſt the repreſentatives of the real eſtate. 2 *Atk.* 51. 1740. *Plunket* v. *Penſon.*

2. An inquiſition of attainder is only to inform, and does not entitle the crown to any right; and therefore it was held that it was not neceſſary to make the Attorney-General a party. 2 *Atk.* 399. 1742. *Burk* v. *Brown.*

3. There is ſometimes a demurrer for want of parties, ſometimes a plea; a demurrer where it appears on the face of the bill; but where it appears by way of averment, there muſt be a plea of want of parties. 1 *Veſ.* 427. *May* 1749-50. *Plummer* v. *May.*

16 Vin. 366.

(F) To a Bill of Diſcovery, that he is a Purchaſor, &c.

1. WHERE a party pleads his title, and ſwears himſelf a purchaſor for a valuable conſideration without notice of the plaintiff's title, a court of equity ought not to allow any examination of witneſſes *in perpetuam rei memoriam*, to defeat the title of ſuch

ſuch purchaſor, but leave the plaintiff to recover as he can, without giving him any aſſiſtance. 3 *Bro. Par. Ca.* 473. 1729. *Roſs and others* v. *Cloſe and others.*

2. A defendant, in his plea of a purchaſe for a valuable conſideration, omits to deny notice; if the plaintiff replies to it, all the defendant has to do is to prove his purchaſe, and it is not material if the plaintiff proves no notice, for it was the plaintiff's own fault that he did not ſet down the plea to be argued, in which caſe it would have been over-ruled. 3 *P. Wms.* 94. *Hil.* 1730. *Harris* v. *Ingledew.*

3. In a plea of a purchaſe, it is a ſufficient denial of notice to ſay that *at the time* of the purchaſe he had no notice, without ſaying or at any time before. 3 *P. Wms.* 244. *Hil.* 1733. *Jones* v. *Thomas.*

4. In all caſes of a plea of a purchaſe or marriage ſettlement, notice muſt be denied though not charged by the bill; and it may be ſufficient to deny it either by the plea or anſwer, notwithſtanding the objection that it ought to be in the plea, ſince all the defendant has to do is to prove his plea; for the defendant is not to prove a negative, *viz.* that he had no notice. However it ſeems beſt to deny notice both in the plea and the anſwer. *Aſton* v. *Curzon, Hil.* 1719. *In notis,* 3 *P. Wms.* 243. *Weſton* v. *Berkeley, Ibid.*

5. In the pleading of a purchaſe or mortgage, the defendant muſt plead that the ſeller or mortgagor was or pretended to be ſeiſed in fee. 3 *P. Wms.* 281. *Eaſt.* 1734. *Head* v. *Egerton.*

6. On a plea of a purchaſe for a valuable conſideration, without notice of the plaintiff's title, it is ſufficient to aver, that the perſon who conveyed was ſeiſed or pretended to be ſeiſed when he executed the purchaſe deeds, but where a purchaſer ſets up a fine and non-claim as a bar, he muſt aver that the ſeller was *actually* ſeiſed. 2 *Atk.* 630. 1743. *Story* v. *Lord Windſor.*

7. A purchaſer, denying notice at or before the execution of the deeds, is not ſufficient; he muſt aver that he had notice at or before the payment of the money. 2 *Atk.* 630. 1743. *Ibid.*

8. To a bill for poſſeſſion, a purchaſe for a valuable conſideration is pleaded, and that the money is *bonâ fide* ſecured to be paid; being only ſecured it may never be paid, and the plea therefore over-ruled, 3 *Atk.* 304. 1745. *Hardingham* v. *Nichols.*

9. Where the bill charges particular and ſpecial inſtances of notice of the plaintiff's title on the defendant, his denial of notice generally is not ſufficient; and therefore the plea of a purchaſe for a valuable conſideration without notice was over-ruled. 3 *Atk.* 815. 1754. *Radford* v. *Wilſon.*

10. Plea to diſcover whether one, from whom the defendant purchaſed, was a papiſt, allowed. 2 *Veſ.* 389. 1751. *Harriſon* v. *Southcote.*

11. Where the bill ſtates circumſtances of notice, a plea of *purchaſe without notice* alone is not ſufficient, but muſt deny the circumſtances. 2 *Bro. Cha. Rep.* 143. 1787. *Newman* v. *Wallis.*

12. Plea

12. Plea of a purchaſe for a valuable conſideration is not good to a bill for dower. 3 *Bro. Ch. Rep.* 264. *Williams* v. *Lambe.*

13. Plea that defendant's teſtatrix had neither *conſtructive or actual notice of the plaintiff's title*; not denying the facts ſtated in the bill from which the conſtructive notice is to be deduced, bad. 4 *Bro. Ch. Rep.* 322. 1793. *Jerrard* v. *Sanders.* 2 *Veſ. jun.* 187. S. C.

14. Plea, that the perſon through whom the plaintiff claims died a batchelor and without iſſue, ordered to ſtand for an anſwer. 4 *Bro. Ch. Rep.* 439. 1793. *King* v. *Holcombe.*

15. Plea of a fine over-ruled, becauſe no ſeiſin was alleged. 2 *Veſ. jun.* 450. 1794. *Page* v. *Lever.*

16. Bill by tenant for life in poſſeſſion for diſcovery and delivery up of title deeds; plea, a mortgage in fee by a former tenant for life, alleging himſelf to be ſeiſed in fee, without notice, ordered to ſtand for an anſwer with liberty to except. 3 *Veſ. jun.* 222. 1796. *Strode* v. *Blackburne.*

25 Vin. 367.

(G) Former Suits, Decrees, &c.

1. TO a bill filed in *Ireland*, the defendant pleads a decree and proceedings for the ſame matter in the court of Chancery of *England*. Plea allowed. 3 *Bro. Par. Ca.* 584. 1731. *Fitzgeral* v. *Fitzgerald.*

2. To a bill brought for a renewal of a leaſe for lives, the defendant pleads the minutes of a former decree in a ſuit brought for the ſame purpoſe, by the perſon under whom the preſent plaintiff claimed, and by which minutes the court ordered that bill to be diſmiſſed. This plea was not allowed, but ſtood for an anſwer with liberty to except. 6 *Bro. Par. Ca.* 73. 1765. *Charles* v. *Rowley.*

3. An adminiſtrator of a judgment creditor brought the original bill, and died; the executor of the adminiſtrator brought the bill of revivor, which was thought to be wrong, and thereupon another bill of revivor was brought by the ſame plaintiff, having firſt taken out adminiſtration *de bonis non*, &c. to the judgment creditor; the defendant pleaded the bill was for the ſame matter, and upon this it was referred to the Maſter to examine whether it was ſo, who made a ſpecial report, that the *laſt bill of revivor* is brought by the plaintiff *in a different right* from what the former was, but does not ſay it was or was not for the ſame matter. Plea over-ruled, becauſe it appeared that the bill was brought by a perſon in a different right. 2 *Atk.* 144. 1740. *Huggins* v. *The York Buildings Company.*

4. A co-adminiſtrator, who was a plaintiff in a bill in 1723, brings a bill in 1739, partly of revivor, and partly ſupplemental, to the ſame purpoſe pretty near with the original bill. Plea of the former diſmiſſion allowed. 2 *Atk.* 82. 1740. *Bowden* v. *Beauchamp.*

(H) That it is Matter at Law.

16 Vin. 369.

1. TO a bill for ſetting aſide certain leaſes as being improperly made, the defendant pleaded that the queſtion was properly triable at common law only, and the plea was allowed. 7 *Bro. Par. Ca.* 374. 1776. *Hon. Hely Hutchinſon* v. *Gamble and others.*

2. *A.* by leaſe grants *B.* a liberty of ſearching and digging for coals in certain lands, for a term of 100 years, rendering an eighth part of the coal by way of rent. The colliery is worked for ſome years and then diſcontinued. The perſon claiming the land under *A.* begins to work the mine, whereupon thoſe claiming under *B.* file a bill to reſtrain the working, and for a diſcovery of their title, in order to maintain an action of treſpaſs; to this bill the defendants plead in bar, both to the diſcovery and relief, that *B.* and thoſe claiming under him, had ceaſed working the colliery for a ſpace of 55 years, and had therefore waived and relinquiſhed the benefit of the leaſe; but the plea was over-ruled; the matter of it being properly determinable at law. 7 *Bro. Par. Ca.* 404. 1776. *Crang* v. *Adams.*

3. An award was made a rule of the court of King's Bench according to a ſubmiſſion for that purpoſe, and an attachment had been granted for not performing the award, bill ſuggeſting fraud in the arbitrators, and praying that the award might be ſet aſide; plea of the award, and inſiſting that it was fair: plea was ordered to ſtand for an anſwer. 2 *Atk.* 155. 1740. *Hampſhire* v. *Young.*

4. Plea of matter which would be a good plea to the action at law, not a plea here in bar of diſcovery. 2 *Bro. Ch. Rep.* 7. 1785. *Hindman* v. *Taylor.*

(I) Limitations, Statutes.

16 Vin. 370.

1. THE ſtat. of limitations was pleaded to a bill of diſcovery, and over-ruled. *Bunb.* 60. 1720. *Dean and Chapter of Weſtminſter* v. *Sir Thomas Croſs.*

2. The ſtatute of limitations is no plea where the bill charges fraud, but then it ſhould be charged by the bill that the fraud was diſcovered within ſix years of the filing of the bill. 3 *P. Wms.* 144. *Mich.* 1732.

3. In the caſe of the *South Sea* Company, in whom the eſtates of the late directors are veſted by act of parliament, where the ſtat. of limitations might have been pleaded againſt the late directors, it is pleadable againſt the company, who ſtand in ſuch directors' place. *Ibid.*

4. Where the aſſignee of the effects of a bankrupt claims under the act of parliament; yet as the ſtatute of limitations might be pleaded

pleaded againſt the bankrupt, by the ſame reaſon it is pleadable againſt ſuch aſſignee. 3 *P. Wms.* 144. *Mich.* 1732.

5. The ſtatute of limitations cannot be pleaded to the diſcovery when the debt was due, though it may to the debt itſelf, becauſe, by the defendant's ſetting forth when the debt commenced, it will appear to the court, whether the ſix years are incurred according to the ſtatute. 2 *Atk.* 51. 1740. *Mackworth* v. *Cliſton.*

6. The defendant pleaded a fine and non-claim in bar to the title ſet up by the plaintiff; the plea was over-ruled, becauſe the pendency of the ſuit here, as it was a proper matter of equity, has prevented the running of the fine. 2 *Atk.* 389. 1742. *Baker* v. *Pritchard and others.*

7. Bill by a creditor of an inteſtate for 100*l.* on note, charging that the adminiſtratrix promiſed to pay it, as ſoon as ſhe could get in effects, to which ſhe pleaded the ſtatute of limitations, and that ſhe made no promiſe to pay the note, too general, for ſhe ſhould have pleaded, that ſhe made no promiſe to pay the note out of aſſets. Plea of the ſtatute of limitations muſt ſay the cauſe of action *hath not accrued within the ſix years*, that the defendant hath not promiſed to pay within ſix years, is bad. 3 *Atk.* 70. 1743. *Anon.*

8. When fraud is charged, the defendant cannot plead the ſtatute of limitations to the diſcovery of his title, but muſt anſwer to fraud. 3 *Atk.* 558. 1747. *Bicknell* v. *Gough.*

9. Length of time proper for a plea, not a demurrer. 2 *Veſ.* 110. 1750. *Gregor* v. *Moleſworth* See *Aggas* v. *Pickerell*, 3 *Atk.* 225.

10. Plea to a bill of diſcovery in ſupport of an action under ſtat. 9 *Anne*, *c.* 14. for money loſt at play, by the aſſignees of the loſer, a bankrupt, that the action was not commenced, and the bill exhibited within three months, over-ruled. 2 *Veſ. jun.* 514. 1794. *Brandon* v. *Sands.*

11. Bill by an annuitant under a will for an account of arrears againſt two adminiſtrators with the will annexed: one pleaded the ſtat. of limitations to ſo much as ſought ſatisfaction for the arrears, or ſo much as was ſtated to have accrued due previous to ſix years before the bill: he alſo by anſwer ſet up an agreement to relinquiſh the annuity: plea over-ruled without prejudice to inſiſting on the ſame matter by anſwer. 2 *Veſ. jun.* 571. 1795. *Higgins* v. *Crawford.*

12. Defendant pleaded 40 years poſſeſſion without account, or admiſſion of any debt to a bill ſeting up an old mortgage, and ſtating an account ſettled, and that owing to infancy, coverture, and other diſabilities, plaintiffs could not proceed; plea allowed. 2 *Veſ. jun.* 669. 1795. *Blewitt* v. *Thomas.*

(L) Releaſes. 16 Vin. 371.

1. TO a bill for account and diſcovery, plea of releaſe farther and other than in the plea ſet forth; plea over-ruled. 2 *Veſ.* 108. 1750. *Salkeld* v. *Science.*

So a plea containing exception of matters after mentioned over-ruled. 2 Veſ. 108. *Ibid.*

2. Bill charging fraud in obtaining releaſe; plea, the releaſe, ſupported by an anſwer, denying the fraud, the benefit of the plea was ſaved to the hearing. 2 *Veſ.* 258. *Trin.* 33 *G.* 3. *Lloyd* v. *Smith.*

3. Bill to ſet aſide releaſe for fraud; plea the releaſe nakedly, and no anſwer. The court would not give leave to amend, but over-ruled the plea. 1 *Anſtr.* 276. *Trin.* 33 *G.* 3. *Freeland* v. *Johnſon.*

(Q) Put in. At what Time. 16 Vin. 374.

1. A Demurrer not coupled with a plea or anſwer, muſt be filed within eight days, excluſive of the day of appearance, or before an order for time be obtained. *Hind.* 210.

2. On time given to anſwer, the defendant may put in a plea, for that is an anſwer, and on oath, but he cannot put in a demurrer. 3 *P. Wms.* 81. 1730. *Jones* v. *Earl of Strafford.* 1 *Bro. Ch. Rep.* 56. *Roberts* v. *Hartley.*

3. Demurrer may be filed after time for anſwering is out, provided it be filed before proceſs of contempt iſſues. 3 *Bro. Ch. Rep.* 372. 1791. *Eaſt India Company* v. *Henchman.*

4. If an order be obtained for time to anſwer only, a demurrer to part will not do. 2 *Bro. Ch. Rep.* 214. 1787. *Kenrick* v. *Clayton.*

(R) *How* the Plea, or Plea and Demurrer muſt be.

See letter A. See *Demurrer.*

(S) Pleas. *Of ſetting down the Plea to be argued, &c. and what* ſhall be ſaid a Waver. 16 Vin. 375.

1. WHERE a plaintiff replies to a plea, he admits it to be a good bar, if the facts therein alleged are true: and therefore he cannot afterwards complain of the order made for allowing the plea, but muſt proceed to examine witneſſes to falſify it. 4 *Bro. Par. Ca.* 74. 1732. *Lord Baron Dunſany* v. *Shaw.*

2. Plea muſt be ſet down in eight days. 3 *Bro. Ch. Rep.* 1791. *Jordan* v. *Sawkins.*

3. A plea of outlawry, like all other pleas, ought to be ſet down by the defendant. 2 *Anſtr.* 554. *Eaſt.* 35 *G.* 3. *Chapman* v. *Lanſdown.*

16 Vin. 377. (T) Over-ruling his own Plea. What ſhall be ſaid to be.

1. WHERE a defendant inſiſts by plea, that he ought not to be obliged to diſcover the ſeveral matters mentioned in the introduction of it, and yet by his anſwer diſcovers thoſe very particulars, the plea is bad in point of form. 6 *Bro. Par. Ca.* 116. 1766. *Dobbyn* v. *Barker.*

2. Plea overruled, being coupled with an anſwer which admitted the facts. 2 *Atk.* 155. 1740. *Cottington* v. *Fletcher.*

3. Where a plea is a bar to the whole bill, if at all, an anſwer to any matters, which might have been covered by the plea, overrules it. 1 *Anſtr.* 14. *Eaſt.* 32 *G.* 3. *Blacket* v. *Langlands.*

4. Where the bill charged an award to have been obtained corruptly, a plea ſetting up the award, and denying the ſpecific charges of fraud, is bad, as not bringing the cauſe to one point, and an anſwer to the ſame charges over-rules the plea. 1 *Anſtr.* 59. *Trin.* 32 *G.* 3. *Pope* v. *Biſh*, and *Edmundſon* v. *Hartley* *Ibid.* 97. S. P.

5. To ſupport a plea of a former decree, ſo much of the firſt bill and anſwer muſt be ſet forth as will ſhew that the ſame point was then in iſſue. 2 *Atk.* 603. 1743. *Sir Cæſar Child* v. *Gibſon.*

6. Whoever comes in before a Maſter under a decree is *quaſi* a party to that ſuit; and if he brings a new bill, a plea that a former ſuit is ſtill depending, allowed. 3 *Atk.* 557. *Neve* v. *Weſton.*

7. To a bill brought againſt the defendant as an executor to account, he pleads a ſuit in the court of Chancery at *Jamaica*, brought againſt him by the plaintiff, with the like matter of complaint relating to the executorſhip; neither the terms, nor even the year in which the ſuit was inſtituted, being ſet out for certain, there is not that averment which courts of law and equity both require in pleas; and it was over-ruled. 3 *Atk.* 587. 1747. *Foſter* v. *Vaſſall.*

8. Though an action has been brought in *Ireland* on a bond, and ſued to judgment there, it cannot be pleaded to an action here. 3 *Atk.* 589. 1747. *Foſter* v. *Vaſſall.*

9. If no final order for foreclоſure, it is not a good plea to a bill for redemption. 2 *Veſ.* 450. 1752. *Senhouſe* v. *Earl.*

10. Plea of another ſuit depending for the ſame cauſe was referred to the Maſter of courſe, without being ſet down. 1 *Veſ. jun.* 484. 1792. *Anon.*

11 Plea of a former ſuit depending for the ſame cauſe ſet down by the defendant was ſtruck out; but the plaintiff not having

having procured a reference to the Maſter within a month, the bill was, upon motion, diſmiſſed under the ſtanding order. 2 *Veſ. jun.* 672. 1795. *Baker* v. *Bird.*

12. Plea of a ſuit depending in the court of Chancery in *Ireland* for the ſame matter, over-ruled. 4 *Veſ. jun.* 357. 1798. *Lord Dillon* v. *Alvarez.*

Plea and Pleadings. [G]

(B) Of Pleadings in general. Good or not. 18 Vin. 377.

1. IF two or more join in a defence which is a ſufficient juſtification for one, but no juſtification for the others, the plea is bad as to all; for the court cannot ſever it, and ſay that one is guilty and others not, when they all put themſelves upon the ſame terms. *Philips* v. *Biron*, 1 *Stra.* 509. and *vide* 1 *Stra.* 994. *Ibid.* 1184. 3 *Term Rep.* 376.

2. On a writ in debt for 1066*l.* plaintiff declared for 1000*l.* borrowed by defendant of plaintiff; and in a ſecond count for 66*l.* for intereſt of money lent by plaintiff to defendant, defendant pleaded in abatement of the writ, that the ſaid ſum of money in the ſaid writ mentioned, and thereby ſuppoſed to be borrowed from plaintiff, was borrowed by defendant and others, and not by defendant ſeparately. On ſpecial demurrer, becauſe this plea anſwered only one of the cauſes of action, (that mentioned in the firſt count), the court held the plea bad. *Herries* v. *Jamieſon*, 5 *Term Rep.* 553.

3. A plea of preſcription for common in a *que eſtate* is good after verdict, though it be not in *expreſs terms* alleged that the owners of the eſtate have uſed it from time immemorial. 3 *Term Rep.* 147.

4. To action on the caſe, if defendant pleads a recovery, and plaintiff replies *nul tiel record*, and concludes with averment, it is good; eſpecially if it is a record of another court: but (*ſemb.*) he may alſo conclude with giving a day to defendant to produce the record. *Sandford* v. *Rogers*, 2 *Wilſ.* 113.

5. Plea of bankruptcy ought to conclude to the country. *Barnes*, 330. *Andr.* 176.

6. If to covenant by an executor, defendant pleads another executor who has proved, and is living, plaintiff's replication ſhould conclude to the country. *Wilkins* v. *Brown*, 2 *Stra.* 1220.

7. Bond that *A.*, on thirty days demand in writing, ſhould account and pay: breach aſſigned, that *A.* did not account and pay in thirty days after demand in writing: pleas, 1ſt, no demand; 2d,

2d, (proteſting on demand, &c.) that *A.* did account and pay: replication, that a demand in writing was made on a day (naming it), and no account by *A.* This concludes well to the country. *Trapand* v. *Mercer*, 2 *Burr.* 1022.

8. If a plea *begin* with an anſwer to *the whole declaration*, but in truth the matter pleaded is only an anſwer *to part*, the whole plea is bad, and the plaintiff may demur. *Truſcott* v. *Carpenter*, 1 *Ld. Raym.* 231. *Woodward* v. *Robinſon*, 1 *Stra.* 303.

9. But if a plea begin only as an anſwer *to part*, and is in truth but an anſwer *to part*, or though in law it is an anſwer to the whole, it is a diſcontinuance, and the plaintiff muſt not demur, but take his judgment for that as by *nil dicit*; for if he demur, or pleads over, the whole action is diſcontinued. *Truſcott* v. *Carpenter*, 1 *Ld. Raym.* 231. *Vincent* v. *Burton*, *ibid.* 716. See alſo 2 *Ibid.* 841. 1 *Stra.* 302.

10. But this rule muſt be underſtood with this limitation, that the part of the declaration which is not anſwered by the plea is material, and the giſt of the action; for where any thing is inſerted in the declaration as *matter of aggravation*, the plea need not anſwer or juſtify *that*, for the anſwering of that which is the giſt of the action will cover the whole declaration. *Dye* v. *Leatherdale*, 3 *Wilſ.* 20. *Taylor* v. *Cole*, 3 *Term Rep.* 297.

11. A plea that plaintiff is an *alien*, is not ſufficient in perſonal action, without ſhewing that he is *inimicus*. *Hopper* v. *Leppett*, *Andr.* 76.

12. Where in debt againſt one as executor the defendant plead a retainer, and plaintiff replies that he is executor *de ſon tort*, and defendant rejoins, that after the laſt continuance he hath taken out adminiſtration; this laſt is a good plea, and no waiver of the former. *Vaughan* v. *Brown*, *Andr.* 328.

13. Bond conditioned to pay money "on *or before* ſuch a day," plea of "payment at a day *before* the particular day ſpecified." The plaintiff demurred to the plea, as offering an immaterial iſſue. The diſtinction is, "that wherever the defendant, in an "action of debt upon bond, with a *ſpecial* condition, pleads *per-* "*formance*, the plaintiff muſt aſſign an *abſolute* breach: though "this be not neceſſary, where the defendant pleads a collateral "matter, (as a releaſe). The preſent plea thereof is *proper*, and "the plaintiff ought to reply, that the money was not paid upon "the day alleged, *nor* at any time *before or after* that day." *Fletcher* v. *Hennington*, 2 *Burr.* 944.

14. *Non eſt factum* may be pleaded to the deed of a *feme covert*, not to the deed of an *infant*, for the deed of the former is *void*, of the latter only *voidable*, and the *infancy* muſt be pleaded ſpecially, and that plea avoids it by relation back to the delivery. *Zouch ex dem. Abbott* v. *Parſons*, 3 *Burr.* 1805.

15. In debt for a penalty on 2 *Geo.* 2. *c.* 24. *ſ.* 7. for unlawfully corrupting voters at an election to parliament, the defendant pleads in *abatement*, an action brought againſt him by another perſon in the *ſame* term for the *ſame* offence. This is a *bad* plea.

Defendant

Defendant muſt ſhew the other action to be actually prior in point of time. *Combe* v. *Pitt*, 3 *Burr.* 1422.

16. In a releaſe pleaded, no place was alleged, and held a material omiſſion on a general demurrer. *Barker* v. *Palmer*, 1 *Com. Rep.* 141.

17. To an action upon promiſes, defendant pleads that after he had undertaken to pay, one *A. B.* promiſed to pay the money due to the plaintiff: and held a bad plea, becauſe the promiſe was not in writing. *Barker* v. *Lamplugh*, 1 *Com. Rep.* 142. *Vide* 2 *Term Rep.* 81.

18. A plea of the performance of a will generally, is bad; for it does not appear whether the legacies were paid, or whether any one was dead, whereby his legacy ſhould be given to the ſurvivors, nor when, or in what manner they were paid. 1 *Com. Rep.* 162. *Hervey* v. *Richardſon.*

19. The bankruptcy of the defendant cannot be pleaded in bar to an action of covenant for rent, or on expreſs covenant. *Mills* v. *Auriol*, 1 *H. Bl.* 433. 4 *Term Rep.* 94.

20. To an action brought by a ſimple contract creditor againſt an executor *de ſon tort* of an inteſtate, the executor cannot plead, that *after action brought*, but *before plea pleaded*, he delivered over the effects to the rightful adminiſtrator, though in fact no adminiſtration was granted till after the action was brought; nor can he plead a retainer for his own debt of a ſuperior degree, with the aſſent of the adminiſtrator. *Vernor* v. *Curtis, in the Exchequer-chamber in error. Hil.* 32 *Geo.* 3. 2 *H. Bl.* 18.

21. An argumentative plea is not good, but ſhall be aided by verdict on a general demurrer. *Wall* v. *Fullwood*, 1 *Com. Rep.* 330. (*n.* 2.)

22. A plea of the ſtat. 13 *Eliz. c.* 20. was allowed to be good, when pleaded to a bill brought by a leſſee for tithes. *Bokenham* v. *Bentfield*, 1 *Com. Rep.* 392.

23. To an action brought by the aſſignees of an inſolvent debtor, to recover money owing to him before his inſolvency, in which the plaintiffs declare, that in conſideration of the money being due to the inſolvent, the defendant promiſed to pay them as aſſignees, it is a *bad plea* to ſay, "that the cauſe of action firſt "accrued to the inſolvent before the plaintiffs became aſſignees, "and that ſix years had elapſed after the cauſe of action firſt "accrued to the inſolvent, and before the ſuing out of the writ "of the plaintiffs." *Kinder* v. *Paris*, 2 *H. Bl.* 561.

24. Plea to a bond conditioned for payment of money, that it was given as an indemnity againſt another bond, and that the plaintiff has not been damnified, *is bad*. *Meaſe* v. *Meaſe*, 1 *Cowp.* 47.

25. *Riens in arrere* is a good plea to an action of *debt* for rent. *Warner* v. *Theobald*, *ibid.* 588. *Secus*, in an action of *covenant*, admitted *arguendo*.

26. In debt on a bond, plea that the money for which the bond

was given was won by gaming is well enough, though not the very words of the ſtatute. 1 *Stra.* 494.

27. That which appears in the plaintiff's declaration need not be averred in the plea. *Ibid.*

28. Where the defendant pleads that the bond was given for money won by gaming, he muſt ſhew the particular game at which it was won. *Ibid.*

29. Special plea of *nil habuit in tenementis* cannot be pleaded to action for rent on leaſe by indenture. *Palmer* v. *Ekins*, 2 *Stra.* 817.

30. Upon a *devaſtavit* againſt executors, not guilty may be pleaded as well as *nil debet*. *Coppin q. t.* v. *Carter*, 1 *Term Rep.* 462.

31. In *aſſumpſit*, "that the defendant indorſed over to the "plaintiff a promiſſory note for and on account of the debt, and "that the plaintiff then and there accepted it for and on account "of the debt," is a good plea; for the plaintiff might have indorſed it over to a third perſon, by whom the defendant might have been ſued without the means of defence, or the plaintiff might by laches have made it his own: but in ſuch caſe the plaintiff may reply, that the note was bad, or unpaid. *Kearſlake* v. *Morgan*, 5 *Term Rep.* 513.

32. A plea by an heir at law, who was ſued by an obligee of his anceſtor, that he claimed to retain a certain ſum for money laid out in repairing the premiſes, cannot be ſupported. *Shuttleworth* v. *Neville*, 1 *Term Rep.* 454. *Qu.* Whether neceſſary repairs might be ſo pleaded. *Ibid.* 457.

33. To *aſſumpſit* by ſeveral partners the defendant may plead in bar the bankruptcy of one of them. *Eckhardt* v. *Wilſon*, 8 *Term Rep.* 140.

34. *Non damnificatus* cannot be pleaded to debt on bond, conditioned for the payment of a ſum of money at a certain day, though it appear by the condition that the bond was given by way of indemnity. *Holmes* v. *Rhodes*, 1 *Boſ. & Pull.* 638.

35. A plea that the plaintiff and defendant agreed to ſettle all matters in diſpute, and to bind themſelves in a penalty not to ſue each other, is a bad plea, as it does not amount to ſatisfaction. *James* v. *David*, 5 *Term Rep.* 141.

36. Replication *de injuriâ ſuâ propriâ abſque tali cauſâ*, is bad, where the defendant inſiſts on a right. *Cooper* v. *Monk*, *Wilies' Rep.* 54.

37. So it has been determined, that a plea *de injuriâ ſuâ propriâ abſque tali cauſâ* to a recognizance for rent in arrear, is bad. *Jones* v. *Kitchin*, 1 *Boſ. & Pull.* 76.

38. Performance of a covenant pleaded otherwiſe than in the terms of the covenant itſelf is bad, even on general demurrer. 1 *Boſ. & Pull.* 458.

39. In pleading a tender of a ſum of money according to a defeazance, which is a different inſtrument from the original deed, it is not neceſſary either to plead that the party has always been,

been, and ſtill is ready to pay, or to bring the money into court. *Trevett* v. *Aggas*, *Willes' Rep.* 110. *Aliter* if the defeazance be in the ſame deed. *Ibid.*

40. Plea to *aſſumpſit* that the defendant, who was the payee of a promiſſory note indorſed it to the plaintiff, "for and on account of" the ſaid debt, is a good plea. *Kearſlake* v. *Morgan*, 5 *Term Rep.* 513.

41. Pleading that corn which had been cut was left on the ground until it was fit, in a courſe of huſbandry, to be carried, is ſufficient, without ſaying how long it remained there, the reaſonableneſs of the time being a queſtion of fact for the jury, and not a queſtion of law for the court. *Eaton* v. *Southby*, *Willes' Rep.* 134.

42. To a debt on bond conditioned for the payment of a certain ſum at a certain day, defendant pleaded, that by articles of agreement between the plaintiff, her ſiſter, and the defendant, the intereſt of the money was to be paid to one of the ſiſters upon an event which had happened; but as the plea did not allege the payment of the intereſt accordingly, it was holden bad. *Baldee* v. *Elders*, 5 *Term Rep.* 250.

43. A charter of *Will.* 3. granted to the town of *Liverpool*, directs that the common councilmen ſhall be elected in ſuch manner as was uſed before the former charter of *Car.* 2. The defendant to a *quo warranto* information for exerciſing the office of comman councilman, pleaded, that before the charter of *Car.* 2. the mayor, bailiffs, and burgeſſes, uſed to elect, (except at thoſe times when there was any bye-law to regulate the mode of election:) it was held that the plea was bad, becauſe it did not ſhew what was the uſage in fact before the charter of *Car.* 2. *Rex* v. *Birch*, 4 *Term Rep.* 608.

(E) At what Time Defendant muſt plead. 16 Vin. 382.

1. IF a *bill* be filed againſt *an attorney*, or other privileged perſon, or againſt a priſoner, and a copy thereof delivered, four days excluſive before the end of the term, including *Sunday*, the defendant muſt plead as of that term; the plaintiff having entered a rule to plead, and demanded a plea; but if the bill be not filed, and copy delivered within that time, the defendant is entitled to an imparlance. Rule *M.* 5 *Ann.* 3. *a. Gilb. K. B.* 346. Afterwards, when the clauſe of *ac etiam* was introduced into the bill of *Middleſex*, and other proceſs in treſpaſs, it became a rule, that where the cauſe of action was ſpecially expreſſed in the proceſs, the defendant ſhould not have liberty of imparling without leave of the court, but ſhould plead within the time allowed by the courſe of the court, to defendants ſued by the original writ. *R. H.* 2 *Geo.* 2. At length it was determined, that even upon a ſpecial *capias* by original, the defendant ſhould not be obliged to plead ſooner than upon a common *latitat.* 1 *Stra.* 684.

2. If four terms have elapſed ſince the delivery or filing of the declaration, the defendant ſhall have a whole term's notice to plead before judgment can be entered againſt him. *R. Tr.* 5 & 6 *Geo.* 2. (*b.*); unleſs the cauſe has been ſtayed by *injunction* or privilege. *B.* 2. *Burr.* 660. *Dougl.* 71. And the notice in ſuch caſe muſt be given before the eſſoin-day of the term *, but it does not extend beyond the term; and therefore a rule to plead may be entered, and judgment ſigned in the vacation. 2 *Term Rep.* 40.

* 2 Stra. 1164. 1 Str. 811. *contrà.*

3. This rule was eſtabliſhed for the purpoſe of preventing any ſurpriſe on the defendant after the plaintiff has lain by four terms, without proceeding in his action; and therefore it does not apply where the proceedings have been delayed at the defendant's requeſt. 3 *Term Rep.* 530. 2 *Bl. Rep.* 762.

4. In all caſes where the defendant has appeared and filed common bail, or put in and perfected ſpecial bail, or the plaintiff has appeared and filed common bail for him according to the ſtatute, and the declaration is delivered or filed, and notice thereof given four days *excluſive* before the end of the term in which the writ was returnable; if the venue be laid in *London* or *Middleſex*, and the defendant live within twenty miles of *London*, the declaration ſhall be delivered or filed *abſolutely*, with notice to plead within four days; or in caſe the action be laid in any other county, or the defendant live above twenty miles from *London*, within *eight* days *excluſive* after the delivery or filing thereof; and the defendant muſt plead accordingly without any imparlance, or in default thereof, the plaintiff may ſign judgment. Rule *T.* 5 & 6 *G.* 2. (*a*).

5. If the declaration be delivered or filed, with notice to plead within the *firſt* four days of term, the defendant has all the morning of the *fifth* day to plead; and judgment cannot be ſigned, for want of a plea till the opening of the office in the afternoon of that day. *Shepperd* v. *Mackreth*, 2 *H. Bl.* 284.

6. But in any other part of the term, if the defendant do not plead within four days, the plaintiff may ſign judgment on the morning of the fifth day: and if a plea be not put in the day the rule expires, and the other party do not take advantage of it immediately, the defendant may deliver his plea at any time before judgment is actually ſigned againſt him. 1 *Term Rep.* 16. 4 *Term Rep.* 195, 6. 5 *Ibid.* 35. *Tidd's Pr.* 387.

7. Where the defendant has not appeared or filed bail, the rule is that, "upon all proceſs returnable before the *laſt* return "of any term, where no affidavit is made and filed of the cauſe "of action, the plaintiff may file or deliver the declaration *de* "*bene eſſe* at the return of ſuch proceſs, with notice to plead in "*eight* days *excluſive* after the filing or delivery thereof." being the ſame time as is allowed for the defendant to appear and file common bail, and if the defendant do not file common bail, and plead within the ſaid *eight* days, the plaintiff having filed common bail for him, may ſign judgment for want of a plea. Rule *T.* 22 *G.* 3. And *vide* rule *M.* 10 *G.* 2.

8. But

8. But if the declaration be not filed until *after* the return of the proceſs, the defendant has eight days to plead from the time of filing it, whenever it may be. 1 *Burr.* 56. *Delatre* v. *Mango.*

9. If the defendant plead before the bail are perfected, his plea will be conſidered as a nullity. 4 *Term Rep.* 578.

10. If a plea be demanded on a *Saturday*, the defendant has twenty-four hours to plead after the demand, excluſive of *Sunday*. *Solomons* v. *Freeman*, 4 *Term Rep.* 557.

11. Though a rule to plead expire on a *dies non juridicus*, the defendant is bound to plead on or before that day, and if he does not, judgment may be ſigned on the next day. *Meſure* v. *Brittain*, 2 *H. Bl.* 616.

12. Every plea in abatement muſt be pleaded before the rule for pleading is out, and cannot be pleaded after an imparlance, unleſs the declaration be delivered ſo late in the term that the defendant is not bound to plead to it in that term, or be delivered after term, in both which caſes the defendant may within four days incluſive of the ſubſequent term, plead any plea in abatement, as of the preceding term. *Per Buller* J. *Jennings* v. *Webb*, 1 *Term Rep.* 278.

13. The four days allowed for pleading in abatement are both incluſive. *Ibid.*

14. If declaration is delivered to a priſoner the laſt day but one of a term, he muſt plead two days before the *eſſoin* of next term. *Barnes*, 224.

15. Formerly the rules to plead ran for eight days, and the four firſt only were allowed for pleas in abatement: but pleas in chief were ſufficient, if they came in before judgment ſigned. In *Trin.* 6 *G.* 2. the time of pleading was ſhortened to four days, and no proviſion for any diſtinction between the two ſorts of pleas; but this does not enlarge the time as to pleas in abatement, which muſt ſtill come in within the four days, and cannot be received after. *Long* v. *Miller*, 2 *Stra.* 1192. *Wilſ.* 23. *Anderſon* v. *Baliſlade*, 2 *Stra.* 1268.

16. If the plaintiff do not *demand* a plea, the defendant may plead in bar *after* the expiration of the four days, but he cannot plead in *abatement* after the four days, though no demand made; and if he do, the plaintiff may ſign judgment. 1 *Term Rep.* 689.

17. Where a plea in abatement is not merely dilatory, but goes to the merits of the cauſe, the court will allow the defendant a longer time than the four days to offer ſuch a plea, in the ſame manner as they will permit a tender after a ſpecial imparlance. *Per* Lord *Kenyon* C. J. *Milner* v. *Milnes*, 3 *Term Rep.* 632.

18. If *oyer* is not delivered in time, defendant has as many days to plead after the rules are out, as he had when he demanded *oyer*. *Powel* v. *Guy*, 1 *Stra.* 705.

19. Defendant has as long time to plead after *oyer* given, as he had when *oyer* demanded. *Barnes*, 238. *R.* 5 & 6 *G.* 2. (*b*). 1 *Stra.* 705.

20. And if the plaintiff *amend* his declaration, the defendant ſhall have *two* days, excluſive of the day of amendment, to alter his firſt plea, or plead *de novo*. *Ibid.* And ſee *R. M.* 10 *G.* 2. *Reg.* 2. (*b*).

21. In an order to enlarge the time for pleading, the court of C. P. held, that the time was reckoned incluſive of the date of the order, but excluſive of the day when it expired. *Kay* v. *Whitehead.* 1 *H. Bl.* 35.

22. But in a ſubſequent caſe it appears that the officers of the court conſidered, that the firſt and laſt days are both to be reckoned incluſively. *Freeman* v. *Jackſon*, 1 *Boſ. & Pull.* 479.

16 Vin. 387. (F) What Plea may be pleaded, after Time to plead granted.

1. IF defendant, when under an order to plead iſſuably, puts in a plea which, though informal, goes to the ſubſtance of the action, the plaintiff cannot ſign judgment as for want of a plea. *Thelluſon* v. *Smith*, 5 *Term Rep.* 152.

2. If defendant has time to plead on the uſual terms of pleading an *iſſuable* plea, *&c.* and pleads 23 *H.* 6. *c.* 10. (againſt ſheriffs taking bonds *colore officii*, *&c.*) and that this bond was taken for eaſe and favour, *&c.* it is within the order, and judgment ſigned for want of plea ſhall be ſet aſide with coſts. *Dearden* v. *Holden*, 1 *Burr.* 605.

3. A plea in abatement is not an iſſuable plea within a judge's order of time to plead upon the uſual terms. But a plea of tender is. *Kilwick* v. *Maidman*, 1 *Burr.* 59. *Barnes*, 263. 1 *Boſ. & Pul.* 223.

4. Under a judge's order to plead iſſuably, the defendant can only put in a plea which goes to the merits. The plea of *alien enemy* is not ſuch a plea. *Simeon* v. *Thompſon*, 8 *Term Rep.* 71.

5. If defendant, being under an order to plead iſſuably, plead ſeveral pleas, one of which is not iſſuable, the plaintiff may ſign judgment as for want of a plea, though the others be iſſuable pleas; for the plea which was pleaded in diſobedience to the order vitiated all the others. *Waterfall* v. *Glode*, 3 *Term Rep.* 305.

6. Where a defendant, when under an order to plead iſſuably, put in a plea, though informal, which went to the ſubſtance of the action, the court held that the plaintiff could not ſign judgment as for want of a plea. 5 *Term Rep.* 152.

7. In the caſe of *Rucker* v. *Hannay* (which over-ruled the caſe of *Studholme* v. *Hodgſon*, 2 *Term Rep.* 390.) the court held that after a defendant has obtained an order for time to plead on the terms of pleading iſſuably, he may in ſuch caſe plead the general iſſue, and the ſtatute of limitations. 3 *Term Rep.* 124.

(H) Amendment, or Alteration of Pleas. In what Caſes. 16 Vin. 389.

1. THE court will, on ſpecial circumſtances, give leave to withdraw a plea and plead another (as on a bond to withdraw *non eſt factum*), and plead the ſtatute of gaming on payment of coſts, taking ſhort notice of trial, and giving judgment of the ſame term, if verdict for plaintiff. *Jefferies* v. *Walter*, 1 *Wilſ.* 177.

2. The court will, on circumſtances, give leave, after general iſſue pleaded, to plead a ſpecial plea, which brings it on upon the merits; but not a plea that excludes the merits, as the ſtatute of limitations. *Cox* v. *Rolt*, 2 *Wilſ.* 253.

3. Though a new count cannot be added to a declaration after the end of the ſecond term, yet pleas, replications, *&c.* may be amended ſo long as the proceedings are on paper: thus, where the defendant in *treſpaſs* pleaded two pleas, in *Hilary* term, and in *Trinity* term, after iſſue joined, obtained a rule to ſhew cauſe why he ſhould not have leave to amend his two pleas, and to add a third plea; the rule was made abſolute on payment of coſts. *Waters* v. *Bovell*, *B. R.* 1 *Wilſ.* 223.

4. On falſe impriſonment, defendant having pleaded the general iſſue, may plead a juſtification, and the general iſſue on terms. *Taylor* v. *Joddrell*, 1 *Wilſ.* 254.

5. If defendant pleads the general iſſue, plaintiff demurs, and defendant joins, the court may give leave to withdraw his plea, and plead double. *Meard* v. *Phillips*, 2 *Stra.* 906. But *vide* *Law* v. *Law*, *Ib.* 960.

6. Leave was given (after iſſue joined, and notice of trial given) to withdraw the general iſſue, and plead a ſpecial plea upon terms, and waving privilege of parliament. *Wilkes* v. *Wood*, 2 *Wilſ.* 204.

7. The defendant pleaded the general iſſue, but forgot to give notice at the ſame time of a ſet-off; and upon motion in time, the court gave leave to withdraw the plea, in order to deliver the ſame plea again with a proper notice of ſet-off. *Blackburne* v. *Mathias*, 2 *Stra.* 1267.

8. The court gave leave to withdraw the general iſſue, in order to bring money into court, and replead it (within the reaſon of the before cited caſe); not delaying the plaintiff. *Tarlton* v. *Wragg*, *Ibid.* 1271.

9. Debt upon a bond conditioned for payment of money at a future day. Defendant pleaded payment at the day; and before the plaintiff replied, moved to withdraw his plea and plead the ſtat. 5 *Ed.* 3. *c.* 16. againſt the ſale of offices. *Sed per curiam*, This is never done, but in order to plead the general iſſue; not to ſubſtitute one ſpecial plea in the room of another. *Law* v. *Law*, 2 *Stra.* 960. *Vide Ambl.* 906. where the general iſſue was waved, and leave given to plead double.

10. The defendant, having pleaded a judgment recovered, was ruled to abide by his plea, or to plead such plea as he would abide by; and on his afterwards pleading a special plea the plaintiff signed judgment, which the defendant moved to set aside for irregularity. *Shepherd*, against the rule, contended that the judgment was regularly signed for want of a plea, for that the defendant, after being ruled to plead such a plea as he would abide by, could not plead a special plea. *Mingay*, in support of the rule, insisted that the defendant was at liberty to plead specially; it might have been otherwise if the defendant had been ruled to plead issuably. But *the Court* discharged the rule. *Hare* v. *Lloyd*, 1 *Term Rep.* 693. *Prout* v. *Dewar*, *Ibid.* (*n.*) *Cockran* v. *Robertson*, *Ibid.* (*n.*)

11. The defendant may strike out a special plea, and plead the general issue, yet he cannot do so without leave of the court, nor can he do it after a sham plea. *Weald* v. *Needham*, 1 *Wilf.* 29, 2 *Wilf.* 369.

12. Plea of judgment recovered may be withdrawn, and *plene administravit* pleaded. *Barnes*, 330.

13. Plea of tender cannot be withdrawn to plead general issue, *Ibid.*

14. After *non assumpsit infra sex annos*, defendant may not add *non assumpsit*. *Barnes*, 332. 338.

15. Leave has been given to withdraw a plea of *non est factum*, and plead infancy. 1 *Bl.* 357.

16. If a special plea goes to the action, and plaintiff replies to the country, and has been delayed, the court will not give leave to withdraw and plead the general issue. *Freeman* v. *Jones*, 2 *Wilf.* 391.

16 Vin. 392.

(I) Rules as to Pleadings.

1. IT is one of the rules of pleading, that the party justifying must shew and admit the fact. *Taylor* v. *Cole*, 3 *Term Rep.* 298.

2. It is a rule of pleading, that where a subject comprehends multiplicity of matter, there, in order to avoid prolixity, the law allows of general pleading. *J'Anson* v. *Stuart*. *Per Buller* J. 1 *Term Rep.* 753. See the cases in illustration of this rule cited in 2 *Saund.* 410. (*n.* 4.)

3. Whatever is materially alleged, and not traversed, is admitted. *Nicholson* v. *Simpson*, 2 *Stra.* 297.

4. What is laid under a *scilicet* shall not vitiate. *Webb* v. *Turner*, *Andr.* 250. 2 *Stra.* 1095. S. C.

5. The party need not verify a negative. *Harvey* v. *Stokes*, *Willes' Rep.* 6.

6. Where the defendant pleads a matter of excuse, which admits a non-performance (except in the case of an award), the plaintiff need not assign a breach in his replication. *Shelly* v. *Wright*,

Wright, *Willes' Rep.* 12. *Aliter* where the defendant pleads a performance.

7. A defendant must admit the trespass in order to justify it. *Rowe* v. *Tutte*, *Willes' Rep.* 15.

8. A defendant in trespass, who justifies under process of an inferior court, admits the trespass by pleading that he delivered the warrant to the officers, to whom it was directed, to be executed. *Ib.*

9. The facts pleaded in one plea can neither assist nor invalidate another plea on the same record. *Grills* v. *Mannell*, *Willes' Rep.* 380.

10. There is no such rule as that matter of law as well as matter of fact may not be put in issue to be tried by a jury, if complicated with matter of fact; for matter of law is put in issue in most issues. It may come in question upon *non est factum*, *non dimisit*, *devisavit vel non*, *feoffavit vel non*; nay even upon *non assumpsit*, since infancy may be given in evidence on that issue. But the rule is, that a mere matter of law, or a consequence of law, cannot be put in issue by itself. *Per curiam.* *Dawes* v. *Papworth*, *Willes' Rep.* 410.

11. It is a rule in pleading, that the commencement of all particular estates must be shewn in pleading, unless in some cases where they are alleged as matter of inducement. 3 *Wilf.* 72.

12. It is a rule in pleading, that where the plaintiff replies new matter, he must conclude with an averment, that the defendant may have an opportunity of answering the new matter. 2 *Wilf.* 66.

Pledges. [G]

(B) In what Actions (or Cases) they ought to be found. 16 Vin. 397.

1. BY the statute 4 & 5 *Anne*, for the amendment of the law, pledges are become mere matter of form, and may be found at any time before judgment. *Barnes*, 163. *How* v. *Denin*, 2 *Wilf.* 142. 3 *Term Rep.* 157.

2. On special demurrer to action by bill, and for cause, *no pledges*: plaintiff may have leave to amend and add pledges. *Watson* v. *Richardson*, 1 *Wilf.* 226.

[A]

Policy of Insurance.

Of the Policy.

16 Vin. 402.

1. POLICY is the name given to the instrument by which the contract of indemnity is effected between the insurer and insured. *Park on Marine Insurance*, 1.

2. It is only signed by the underwriter or insurer, although certain conditions are to be performed, by the person insured, or it is void. *Ibid.*

3. Two kinds of policies, *valued*; where the property insured is estimated at prime cost, at the time of effecting the policy—*Open*, where the value is not mentioned, but the prime cost must be proved at the trial. *Ibid.*

2 Burr. 1171.

4. Policies when once underwritten cannot be altered. *Ibid.* *Henkle* v. *The Royal Exchange Assurance Company*, 1 *Ves.* 317.

5. But they may by consent of the parties, for *consensus tollit errorem*. *Ibid.* 3.

6. So where the policy stated that the adventure was to commence immediately *from the departure of the ship from* Fort St. George *to* London. The plaintiff brought a bill suggesting that the owner had employed the agent to insure the ship to commence *from her arrival at* Fort St. George, that a label agreeable to these instructions had been entered in a book and subscribed by the agent and two of the directors for the company. That the ship was lost *after* her arrival at *Fort St. George*, but *before* her departure for *England*, and the company refuse to pay, &c. Lord *Hardwicke* thought that this being a mistake of the clerks, the policy ought to be rectified by the label. *Motteux* v. *The Governor and Company of the London Assurance*, 1 *Atk.* 545.

4 Vin Abr. 281. S. C.

7. The policy, when effected, becomes the property of the insured, who may maintain trover for it against the broker, or any other person, if it be wrongfully withheld. *Harding* v. *Carter*, *Sittings at Guildhall*, *East.* 1781. *Park*, 4.

What persons may be insurers.

8. By 6 *Geo.* 1. *c.* 18. the king was authorised to grant charters to two distinct companies or corporations for the insurance of ships, goods, and merchandizes at sea, or going to sea, and for lending money on bottomree.

Vid. 8 G. 1. c. 15. s. 25. 11 G. 1. c. 30. s. 43.

9. By virtue of this regulation two offices under the names of *The Royal Exchange Assurance Office*, and *The London Assurance Office*, were created by charter 22d *June*, 6th of *George* I.

10. After

10. After several clauses for the regulation of these corporations, sect. 12. prohibits any other society or partnership whatsoever from making insurances, declaring the policies void, and the sums underwritten forfeited, one half to his majesty, and the other to the informer. And if they lend money by way of bottomree, the bond or other security shall be void, and such agreement shall be adjudged to be an usurious contract, and the offenders shall suffer as in cases of usury.

11. But any private or particular person or persons shall be at liberty to underwrite any policy, *&c.* or may lend money by way of bottomree, as fully and beneficially as if this act had never been made, so that the same be not on account or risk of a corporation, body politic, or of persons acting in a society or partnership for that purpose.

12. Action by an underwriter against a broker to recover a sum of money received by him to plaintiff's use. A loss having happened upon a policy underwritten by plaintiff, he had paid; but one *B.* having agreed to take half the plaintiff's risk, he had paid his moiety into the hands of the defendant, to recover which the action was brought. Lord *Kenyon* C. J. thought this a partnership within the act, and that the plaintiff, being himself the underwriter, could not enforce such an illegal contract. But where a single name appeared on the policy, the insurer should never be allowed, if a loss happen, to defeat a *bonâ fide* insurance, by saying that there was a secret partnership. And afterwards he said, that the other judges in *B. R.* were of the same opinion. *Sullivan* v. *Greaves, Sittings after Easter* 1789. *Park.*

13. There are other clauses securing to the *South-Sea* and *East-India* Companies all the rights and privileges which they had enjoyed previous to the passing of that act, and the right of lending money on bottomree to the captains of their own ships. Sec. 24. 26. 28.

14. The most frequent subjects of insurance are ships, goods, merchandizes, the freight or hire of ships: also houses, warehouses, and the goods laid up in them from danger by fire, and insurance on lives. *Park*, 9. Cites 1 *Magens*, 4. What things may be insured.

15. It is now established as the law and practice of merchants, that *respondentia* and bottomree must be specified and mentioned in the policy of insurance, and that under a general insurance on *goods and merchandizes* the party insured cannot recover money lent on bottomree. *Glover* v. *Black*, 3 *Burr.* 1394. 1 *Black.* 405.

16. But this case did not mean to determine that no special interest in goods could be given in evidence in other cases than those of *respondentia* and bottomree. *Per* Lord *Mansfield. Ibid.* 3 *Burr.* 1401.

17. The lien which a factor to whom a balance is due has upon the goods of his principal was admitted to be an interest capable of insurance, in *Godin* v. *London Assurance Company*, 1 *Burr.* 489.

18. Money expended by the captain for the use of the ship for which *respondentia* interest was charged, may be recovered under an

an insurance on *goods, specie, and effects*. It being proved that there was an express usage in the *East-India* trade (upon a voyage in which the policy in question had been made,) that this kind of interest is always insured in this way. Which was held to distinguish it from the case of *Glover* v. *Black*. *Gregory* v. *Christie*, *B. R. Trin.* 24 *Geo.* 3. *Park*, 11.

19. By the marine regulations of most if not all of the trading powers in *Europe*, insurances upon the wages of seamen are forbidden. But this regulation is not meant to prevent mariners from insuring those wages which they are entitled to receive abroad, on goods which they have purchased therewith. *Park*, 12. cites 1 *Magens*, 18, 19.

Vid. 8 G. 1. c. 24. s. 7.

20. A policy against the loss of *Fort Marlborough* for the benefit of the governor is good. The place being only a factory, and the insured, though called a governor, being really but a merchant. *Carter* v. *Boehm*, 3 *Burr.* 1905. 1 *Black.* 593.

21. Insurances upon the ships or goods of enemies seem legal in this country, though prohibited on the continent. 1 *Ves.* 320. *Gist* v. *Mason*, *Sittings at Guildhall*, *Mich.* 1785. *Park*, 14.

Ord. of Stockholm, Bynkershoek's Quest. Jur. Pub. lib. 1. c. 21. p. 153.

22. It has been since decided by the unanimous decisions of the court of *B. R.* that a policy of insurance upon the goods of an alien enemy is illegal and void. *Brandon* v. *Nisbett*, 6 *Term Rep.* 23. *Brisstow* v. *Towers*, *ibid.* 35. See also 33 *Geo.* 3. *c.* 27. *s.* 4.

23. By 25 *Geo.* 2. *c.* 26. no insurances shall be made on money lent on bottomree on foreign ships or goods bound to or from the *East Indies*, under the forfeiture of treble the sum insured or lent. But there is an exception in favour of the subjects of such sovereigns as carried on a trade with that part of the world previous to *October* 1748. This act was to have been in force seven years, and seems not to have been continued. *Park*, 15.

Of the requisites of a policy.

24. By 25 *Geo.* 3. *c.* 44. it shall not be lawful for any person or persons *who reside in* Great Britain to make or cause to be made any policy of insurance upon their interest in any ship, or any goods, merchandizes, or other property, without inserting in such policy *his, her, or their own name or names*, as the persons interested therein, *or the name or names of the person or persons who shall effect the same, as the agent or agents* of the person so really interested therein, or for whose use or benefit, or on whose account such policy or policies is or are underwrote: and that it shall not be lawful for any person or persons *who shall not live or reside in* Great Britain to make or cause to be made any policy of assurance upon their interest in any ship or ships, or any goods, merchandizes, or other property, without inserting in such policy the name of the agent or agents of the person or persons so really interested therein, and for whose use or benefit, or on whose account the same is so made and underwrote; and every policy made or underwrote contrary to the true intent and meaning hereof shall be null and void to all intents and purposes.

See Cox et al. v. Parry, 2 Term Rep. 464. in which it was held, that the executors could not recover because, amongst other grounds, the name of their testator was not inserted in the policy.

25. In

25. In an action on a policy of insurance on a ship and cargo from *Sunbury* in *Georgia* to *Amsterdam*, it appeared in evidence that the plaintiffs had been formerly owners of the vessel, and resided in *Georgia*, but they had transferred their property in her to one *Peirec*, living there also; subsequent to which the policy was underwritten. The names of the plaintiffs stood at the head of the policy, and the declaration stated that they had made it for the benefit of *Peirec*. The court were of opinion, that under the foregoing act when an agent effects a policy for his principal residing abroad, such agent's name should be inserted *eo nomine* as agent, and that this policy not having done so, it was void. They also inclined strongly, that by the act it is necessary that the agent should live in *England* when the principal resided abroad. *Pray et al.* v. *Edie*, 1 *Term Rep.* 313.

26. But by 28 *Geo.* 3. *c.* 56. that act is repealed, and it is declared, that it shall not be lawful for any person to make or effect, or cause to be made or effected, any policy of assurance on any ship, or upon any goods, merchandizes, or other property, without first inserting in such policy the name or names, or the usual stile and firm of dealing of one or more of the persons interested in such assurance; or without, instead thereof, first inserting the name or names, or the usual stile and firm of dealing of the person or persons residing in *Great Britain*, who shall receive the order for and effect such policy, or of the person or persons who shall give the order or directions to the agent or agents immediately employed to negociate or effect such policy. Every policy made contrary to the true intent and meaning of this act to be null and void to all intents and purposes.

27. The husband of a ship has no right to insure for any part-owner without his particular direction: nor for all the owners in general, without their general direction, or something equivalent to it. *French* v. *Backhouse*, 5 *Burr.* 2727.

28. It seems necessary to insert the names of the ship and master in order to fix with precision the bottom on which the adventure is to be made. Though sometimes there are insurances generally "*upon any ship or ships* expected from a particular place." *Park*, 19. The name of the ship and master.

29. Mr. *Park* seems to doubt whether if a different captain came in the ship from that whose name is mentioned in the policy, it would be therefore void, as the policy always contains the words, "or whoever else shall go for master in the said ship." *Ibid.*

30. In *Kewley* v. *Ryan*, 2 *H. Black.* 343. where a policy of insurance was on a cargo of cotton and other goods from *Grenada* or *London* put on board any ship or ships, the court of *C. B.* were unanimous that the assured had a right to cover by such policy whatever ship he thought proper that fell within the terms of it.

31. The owners of goods insured, by the act of shifting them from one ship to another do not preclude themselves from recovering

vering an average loss arising from the capture of the second ship, if they acted from necessity, and for the benefit of all concerned: *Plantamour* v. *Staples*, 1 *Term Rep.* 611.

32. It is absolutely necessary that it should be specified in the policy whether the insurance is made on the ships, goods, or merchandizes. But the practice seems unsettled as to specifying the particulars of goods by their marks, numbers, and packages, rather than including them under the general denomination of merchandize. *Park*, 20.

33. Underwriters are not answerable upon a general policy on goods, for goods lashed on deck, the captain's clothes, or the ship's provisions. But they must be specifically named, a policy on goods meaning only such goods as are merchantable, and a part of the cargo. *Ross* v. *Thwaite*, *Sittings after Hil.* 16 *Geo.* 3. *at Guildhall*, *cor. Ld. Mansfield.* *Park*, 21.

34. Action on a policy upon goods to *London*, "and till the same should be safely landed there." The owner of the goods brought down his own lighter, received them out of the ship, and before they reached land an accident happened, whereby the goods were damaged; a special jury, by direction of *Lee*, C. J. found that the insurer was discharged. *Sparrow* v. *Carruthers*, 2 *Stra.* 1236.

35. In *England* no express time for unloading is stipulated, but there must be no unreasonable delay, the estimation of which must always depend upon circumstances. *Park*, 23.

36. The underwriter is liable for a robbery of the goods when committed by thieves from without. *Harford* v. *Maynard*, *cor. Ld. Mansfield at Guildhall*, *Hil.* 1785. *Sed qu.* if for depredations committed by thieves in the vessel. *Vide Park*, 26.

37. Credit is given by the underwriters to the broker, and not to the assured, where the premium is not paid down at the time the assurance is made. *Airy & al. Assignees of Milton* v. *Eland*, *Sittings at Guildhall*, *cor. Ld. Mansfield*, *Trin.* 14 *Geo.* 3. *Park*, 27.

38. By several statutes relating to the stamps, every policy of insurance, not exceeding one thousand pounds, must have a six shilling stamp, and if above that sum a stamp of eleven shillings. *Park*, 29. and the statutes there cited.

39. By 17 *Geo.* 3. *c.* 50. *s.* 17. every skin or piece of vellum or parchment on which any policy of insurance shall be written, whereby the property of one or more persons in houses or goods shall be insured to a greater amount in the whole than one thousand pounds, over and above the several duties already imposed, there shall be an additional duty of five shillings. This statute seems only to relate to insurances against fire.

Of the Conſtruction of the Policy.

1. A Policy muſt always be conſtrued as nearly as poſſible according to the intention of the contracting parties. 1 *Burr.* 347. *Roccus. Not.* 18. *Park*, 30.

2. Whatever is done by the maſter of the ſhip, in the uſual courſe, neceſſarily *et ex juſtâ cauſâ*, although a loſs happen thereon, the underwriter ſhall be anſwerable for. 1 *Burr.*348. *Park*, 30.

3. Action on a policy on the ſhip *Hope*, from *Hamburgh* to *London*, "*and till the ſhip ſhall have moored at anchor* 24 *hours in good ſafety.*" In the courſe of the voyage the maſter committed barratry by ſmuggling. The ſhip arrived in ſafety at her moorings, and remained there 27 days, when ſhe was ſeized by the revenue officers for this ſmuggling. The court of K. B. were of opinion, that this was a conſequential damage for which the inſurer was not liable, for if his liability be extended beyond the time limited in the policy, it would be impoſſible to lay down any fixed rule. *Lockyer & al.* v. *Offley*, 1 *Term Rep.* 252.

4. The *Succeſs* was inſured "*at and from Leghorn to the port of London, and till there moored* 24 *hours in good ſafety.*" She arrived on the 8th *July*, and was moored, but on the ſame day was ſerved with an order to go back to the *Hope*, and perform a 14 days' quarantine. The men upon this deſerted her, and on the 12th the captain petitioned to be excuſed going back. On the 28th the regency conſidered the petition and ordered her back. On the 30th ſhe went back, performed the quarantine, and ſent up for orders to air the goods, but before ſhe returned ſhe was burned on the 23d *Aug.* *Lee* C. J. held the inſurer liable, for though the ſhip was ſo long at her moorings, ſhe was not ſo *in good ſafety*, which muſt mean the opportunity of unloading and diſcharging. *Waples* v. *Eames*, 2 *Stra.* 1243.

5. In an inſurance upon *freight*, if an accident happens to the ſhip before the goods are put on board, which prevents her ſailing, the inſured cannot recover the freight on the policy, for the plaintiff's right to it had not commenced. *Tongue* v. *Watts.* 2 *Stra.* 1251.

6. But if the policy be a valued policy, and part of the cargo be on board when ſuch accident happens, the reſt being ready to be ſhipped, the inſured may recover to the whole amount. *Montgomery* v. *Eggington*, 3 *Term Rep.* 362.

7. On an inſurance warranted to depart with convoy, the ſhip was taken in her way to the place where a convoy was appointed for that trade; *Lee* C. J. held the inſurer liable. *Gordon* v. *Morely*, and *Campbell* v. *Bordieu*, 2 *Stra.* 1265.

8. Inſurance on a ſhip from her arrival at *Fort St. George* till ſhe ſhould arrive at *London*. Lord *Hardwicke*, *Canc.* was of opinion that if ſhe be in a bad condition, and goes to the neareſt place

place where she can be refitted, for that purpose it is the same as if she had been repaired at the very place whence the voyage was to commence, and no deviation to prevent the insured's recovering on the policy. *Motteux & al.* v. *The Governor and Company of London Assurance*, 1 *Atk.* 545.

9. The words of the policy "at and from *Bengal* to *England*," mean the first arrival at *Bengal*. *Per Hardwicke* C. J. 1 *Atk.* 548.

10. If an insurance be at and from a place, and the ship arrives at that place, the insurer is liable as long as the ship is preparing for the voyage upon which it is insured; but not if all thoughts of the voyage be laid aside. *Chitty* v. *Selwin*, 2 *Atk.* 349.

11. When a ship is to touch at several ports in the same island in order to deliver all her outward-bound cargo, the outward risk upon the ship ends, and the homeward risk commences 24 hours after her arrival in the first port to which she is destined; but the outward policy upon goods continue until they are landed. *Camden* v. *Cowley*, 1 *Black.* 417. *Barrass* v. *The London Assurance Company. Sittings at Guildhall, Hill.* 1782. *Park*, 39.

12. Action on a policy of insurance "on goods from *Malaga* to *Gibraltar*, and at and from thence to *England* or *Holland*, beginning the adventure from the loading, and to continue until the ship and goods be arrived at either place, and there safely landed." The agreement was, "that upon the arrival of the ship at *Gibraltar*, the goods might be unloaded and reshipped in one or more *British* ships for *England* and *Holland*." When the ship came to *Gibraltar*, the goods were unloaded and put into a storeship, (which it was proved was always considered as a warehouse,) and that there was then no *British* ship there. Two days after the storeship and goods were lost in a storm. *Lee* C. J. held the insurer liable; for the construction of the policy should be according to the course of trade in the place, and this was the usual mode of shipping and re-shipping in that place, and the court of K. B. refused a new trial. *Wright* J. *dissentiente*. *Tierney* v. *Etherington*, cited 1 *Burr.* 348.

13. Policy of insurance on an *East India* ship, its body, tackle, apparel and other furniture, against perils of the seas, men of war, *fire*, &c. at and from *London* to any ports and places beyond the *Cape of Good Hope* and back to *London*. At *Canton* the ship stayed to clean and refit. In order to which, all the sails and furniture were taken out of the ship, and put into a warehouse built for that purpose on *a sand bank* in the river there, where they were accidentally burnt. This was proved to be the well-known and established usage for all *European* ships going that voyage, to be prudent, and for the general benefit of all concerned. The insurers are liable, for this is a loss within the voyage, though it happened, strictly speaking, upon land, and is within the words and meaning of the policy. *Pelly* v. *The Royal Exchange Assurance Company*, 1 *Burr.* 341.

14. Had

14. Had it been an accidental necessity of refitting, the master might have justified taking them out of the ship, even if it had not been the usage of ships going that voyage. *Per* Lord *Mansfield. Ib.*

15. Insurance upon ships to the port or ports of discharge at *Labrador*, with leave to touch at *Newfoundland* "on the ships till they should be arrived, and should have moored at anchor 24 *hours*, *and on the goods until the same should be there discharged and safely landed.*" One of the ships arrived on the 22d *June*, and the other on the 14th *July*, from which time the crews were employed in fishing, and had taken out none of their cargoes, except such things as they immediately wanted, at leisure hours. On the 13th *Aug.* the vessels were taken by an *American* privateer. In an action on the policy to recover the value of the goods, it being proved to be the usage of the trade both at *Labrador* and *Newfoundland* to keep the goods on board for several months, the court held the underwriter liable, for he is bound to know the nature and peculiar circumstances of the branch of trade to which the policy relates. *Noble* v. *Kennoway*, *Doug.* 492.

16. A policy upon an *East India* ship includes the chance of its being detained in *India*, and the risk of the country voyages she is employed in there, this being the known usage of that trade. *Salvador* v. *Hopkins*, 3 *Burr.* 1707. *Gregory* v. *Christie*, *B. R. Trin.* 24 *G.* 3. *Park*, 49. *Farquarson* v. *Hunter*, *B. R. Hil.* 25 *G.* 3. *Park*, 50.

17. In the two first cases these words were in the policy, "to any ports or places whatsoever;" and in the last the words were, "with liberty to touch and stay at any port or place in this voyage."

18. But the parties may, by their agreement, prevent the construction being extended so far as the usage would carry it, and it is not necessary that express words of exclusion should be used, if the court can collect from the terms used, that the intention was such. *Park*, 51.

19. Thus in an action upon a policy "at and from *Port L'Orient* to *Pondicherry*, *Madras*, and *China*, and at and from thence back to the ship's ports of discharge in *France*, with liberty to touch *in the outward or homeward-bound voyage* at the isles of *France* and *Bourbon*, and at all or any other place or places what or whereso'ever," with a subsequent clause, "that it shall be lawful for the said ship *in this voyage* to proceed and sail, to touch and stay at any ports or places whatsoever, as well on this side, as on the other side of the *Cape of Good Hope*, without being deemed a deviation." The ship arrived at *Pondicherry*, and then sailed for *Bengal* instead of going to *China*, and having wintered there returned to *P.* and was taken in her voyage back to *L'Orient*. Lord *Mansfield* held the voyage to *Bengal* not to be insured, notwithstanding the general words of the policy; for the expressions "*in the outward or homeward bound voyage*," and "*in this voyage*," restrained them to mean, all places whatsoever in

the usual course of the voyage, "*to and from the places mentioned in the policy.*" *Lavabre* v. *Wilson*, *Dougl.* 284.

20. Where there is an insurance *on the ship*, which by stress of weather is detained on her voyage in order to refit, sailors' wages and provisions expended during that time cannot be allowed as a charge against the underwriter. *Fletcher & al.* v. *Poole*, *Sittings at Guildhall*, *East.* 1769. *cor. Ld. Mansfield. Park*, 53.

21. In an action on a policy of insurance *on goods*, the ship was taken during her voyage, condemned, and sold, but on appeal the decree was reversed, and the ship and cargo decreed to be restored, and the amount of the sale was accordingly paid; freight paid to the owner of the ship *pro ratâ itineris* cannot be recovered from the underwriter. *Baillie* v. *Moudigliani*, *H.* 25 *G.* 3. *Park*, 53.

22. So upon a policy *on the ship and goods*, the expences incurred by wages, provisions, demurrage, &c. during a detention in consequence of an embargo are not recoverable. *Eden* v. *Poole*, *Sittings after Hill.* 1785. *Park*, 54. *Vide also Robertson* v. *Ewer*, 1 *Term Rep.* 127.

23. Action on a policy on an *East India* and *China* ship, and on the tackle, ordnance, ammunition, artillery, and *furniture* of the ship. While the ship was in the river *Canton* it became necessary to refit her, for which purpose the stores and provisions, (which were merely for the ship's crew,) were put into a warehouse, where they were destroyed by accidental fire. The court of King's Bench were of opinion that these provisions were comprehended under the word "*furniture*," and protected by the policy: that this case differed from that of *Robertson* and *Ewer*, for there the provisions were consumed by the slaves on board during the detention of the ship. *Brough* v. *Whitmore*, 4 *Term Rep.* 206.

24. In a policy of insurance on a slave ship, which was otherwise in the common form, there was a memorandum "that the assurers were not to pay any loss that may happen in boats during the voyage, (mortality by natural death excepted,) and not to pay for mortality by mutiny, unless the same amount to 10 *per cent.*" There happened a mutiny among the negroes, in consequence of which the ship's crew were obliged to fire upon them. Some were killed in the fray: these Lord *Mansfield* thought within the policy; as he did also others who died of their wounds. Others being baffled in their attempts, in despair starved themselves to death: these he thought not within it. Others received some hurt by the mutiny, but not mortal, and died afterwards of other causes, as from having jumped overboard and swallowed sea water. This he said was the great point which he left to the jury, who found the insurer not liable for those who died by means of these two last causes. *Jones* v. *Schmall*, *Guildhall*, *Trin.* 1785. 1 *Term Rep.* 130.

In this case it was stated, that the mutiny had lessened the price of the remaining slaves. But Lord M. thought this a remote consequence not insured against by the policy.

25. Policy

25. Policy of inſurance "at and from *Liverpool* to *Antigua*, *with liberty to cruize ſix weeks*, and to return to *Ireland*, or *Falmouth*, or *Milford*, with any prize or prizes," means ſix weeks *ſucceſſively* from the commencement of the cruiſe. *Syers & al.* v. *Bridge*, *Dougl.* 509.

26. If an armed force board a ſhip, and take part of the cargo, the underwriters are not liable on a count in the declaration ſtating the loſs to be by a ſeizure by *people* to the plaintiffs unknown; for the word "*people*" in the policy means the governing power in the country. *Neſbitt & al.* v. *Luſhington*, 4 *Term Rep.* 783.

Of Loſſes by Perils of the Sea.

1. ACTION upon a policy of inſurance for the value of certain ſlaves. The declaration ſtated, that by perils of the ſea, contrary winds, &c. the voyage was ſo much retarded, that a ſufficient quantity of water did not remain for the ſupport of the ſlaves and other people on board, and that certain ſlaves periſhed for want of water. On the evidence it appeared that the ſhip being bound to *Jamaica* miſſed the iſland, and the crew being reduced to great diſtreſs for want of water, it was agreed that ſome of the ſlaves ſhould be thrown overboard to preſerve the reſt. The court thought this to be loſs in conſequence of the miſtake of the captain, and not by the perils of the ſea, and granted a new trial. *Gregſon* v. *Gilbert*, *B. R. Eaſt.* 23 *G.* 3. *Park*, 62.

2. When a ſhip is miſſing, and no intelligence received of her within a reaſonable time after ſhe ſailed, it ſhall be preſumed that ſhe has foundered at ſea. *Green* v. *Brown*, 2 *Stra.* 1199. *Newby* v. *Read*, *Sittings*, *Mich.* 3 *G.* 3. *Park*, 63.

3. It is the practice in *England*, that if a ſhip bound to any port in *Europe* be not heard of for ſix months, ſhe is to be deemed loſt, and the inſurers are to pay, or if bound for a greater diſtance, if not heard of in twelve. *Park*, 64.

Of Loſſes by Capture and Detention of Princes.

1. CAPTURE, as applied to the ſubjects of marine inſurances, is the taking of the ſhips or goods belonging to the ſubjects of one country by thoſe of another, when in a ſtate of public war. *Park*, 66.

2. The ſhip is to be conſidered as loſt by the capture, though ſhe be never condemned at all, nor carried into any port or fleet of the enemy. The inſurer runs the riſk of the inſured, and muſt bear the loſs actually ſuſtained. If after condemnation the owner recovers her, the inſurer muſt pay ſalvage or any other expence ſuſtained in getting her back. *Goſs* v. *Withers*, 2 *Burr.* 696.

3. No capture of the enemy can be ſo total a loſs as to leave no poſſibility of recovery. But this chance does not ſuſpend the demand for a total loſs upon the inſurer, and juſtice is done by putting him in place of the inſured in caſe of a re-capture.

4. Action on a policy of inſurance. The ſhip had been captured on an illegal ground; "that ſhe being a neutral veſſel, her cargo, conſiſting of the produce of an enemy's country, was put on board at a neutral port from barks coming immediately from the hoſtile port, without the goods having been landed." There had been a condemnation in the admiralty court, and an appeal to the lords commiſſioners of prizes. The market being high, the cargo in part periſhable, and the cauſe likely to be delayed, the agent of the owners agreed to give the captors a ſum certain, with coſts, for their conſent to a decree of reverſal. Lord *Mansfield* held the inſurers liable to anſwer this average loſs, which was ſubmitted to *bonâ fide* in order to avoid a total one. *Berens* v. *Rucker*, 1 *Black.* 313.

5. The inſured may abandon in caſe merely of an arreſt or embargo by a prince not an enemy. *Per* Lord *Mansfield* in *Goſs* v. *Withers*, 2 *Burr.* 696.

6. The detention by people inſured againſt in the policy means the ruling power in the country, and not the individuals of a nation, as oppoſed to magiſtrates or rulers. *Neſbbit & al.* v. *Luſhington*, 4 *Term Rep.* 783.

7. In caſe of detention by a foreign power, which in time of war may have ſeized a neutral ſhip at ſea, and carried her into port to be ſearched for enemy's property, all the charges conſequent thereon muſt be borne by the underwriters, and whatever coſts may ariſe from an improper detention muſt always fall upon them. *Park*, 79. cites 1 *Magens*, 67. *Saloucci* v. *Johnſon*, *B. R. Hil.* 25 *Geo.* 3.

Vid. 16 Vin. pl. 41. p. 411.

8. Where a damage aroſe from the detention or ſeizure of ſhips by the government of the country to which they belong, it ſeems not to have been doubted in *Robertſon* v. *Ewer* that the inſurer is liable for it. *Park*, 81. 1 *Term Rep.* 127. And in *Rotch* v. *Edie*, 6 *Term Rep.* 413. it was ſo decided in *B. R.*

Of Loſſes by the Barratry of the Maſter or Mariners.

Cites 1 Stra. 581. 2 Stra. 1173. Cowp. 343. 1 Term Rep. 323.

1. ANY act of the maſter or of the mariners which is of a criminal nature, or which is groſsly negligent, tending to their own benefit, to the prejudice of the owners of the ſhip, without their conſent or privity, is barratry. *Park*, 83.

2. It is not neceſſary to entitle the inſured to recover for barratry, that the loſs ſhould happen *in the act of barratry*, but it is immaterial whether it take place during the fraudulent voyage, or after the ſhip has returned to the regular courſe. *Per* Lord *Mansfield*, *Vallejo* v. *Wheeler*, *Cowp.* 155.

3. But

3. But the loss in consequence of the barratry must happen *during the voyage insured, and within the time limited by the policy*, or the underwriters are discharged. *Lockyer* v. *Offley*, 1 *Term Rep.* 252.

4. A ship being advertised to go to *Marseilles*, goods were shipped on board her on behalf of the plaintiff, and the master signed a bill of lading, whereby he undertook to go strait thither. The defendant underwrote a policy from *Falmouth* (the place where the goods were taken in) thither. Before the ship departed from *London* another advertisement was published for goods to *Genoa*, *&c.* and the plaintiff's agent was told that it was intended to go to these ports first, and then to come back to *Marseilles*. But he insisted that his bargain was to go directly to *Marseilles*, and would not consent to let her pass by it, or alter his insurance. The ship did pass by it, and on her return for *M.* was blown up in an engagement with a *Spanish* ship. In an action on the policy, the breach assigned was a loss by the barratry of the master. But the court of K. B. were of opinion that this was not barratry; for the master acted consistent with his duty to his owners, and the plaintiff's agent knew of the intended alteration before the goods were put on board, and might have refused to ship them, or altered the insurance. *Stamma* v. *Brown*, 2 *Str.* 1173.

5. A merchant ship with a letter of marque being insured, the captain received orders from the owners, that if he took a prize he should put some hands on board, and send her back, and proceed himself with the merchants' goods to the port of delivery. He took a prize, and was proceeding to obey his orders, but his crew forced him to go back, though he acquainted them with his directions, and on his return he was captured. In an action on the policy, *Lee*, C. J. held this not to amount to barratry, as the ship was not run away with in order to defraud the owners. But as it was a deviation through necessity, he held the insurers to be answerable. *Elton* v. *Brogden*, 2 *Stra.* 1264.

6. If *A.* be the owner of a ship, and let it out to freight to *B.*, who insures it for the voyage, and the captain afterwards deviates for his own benefit with the knowledge of *A.*, but not of *B.*, it is barratry, for it is a cheat and fraud on *B.*, who is the owner *pro hac vice*, and he shall recover against the insurer any loss sustained in consequence of this deviation. *Vallejo & al.* v. *Wheeler*, *Cowp.* 143.

7. The breach of an embargo is an act of barratry in the master. *Per Buller*, J. *Robertson* v. *Ewer*, *ante*.

8. If a deviation be with the privity or consent of the owners of the ship, it is not barratry. *Vallejo & al.* v. *Wheeler*, *Cowp.* 143.

9. Fraudulent acts of the captain done without the consent of the owners of the goods, but with the consent of the owners of the ship, are not barratry, so as to charge the underwriters. For barratry must partake of something criminal, and be committed *against the owner*, by the *master* or *mariners*, and cannot be committed

againſt him with his conſent. *Nutt & al.* v. *Bourdieu*, 1 *Term Rep.* 323.

10. Where the captain and owner of a ſhip had mortgaged her for a ſum of money, and the mortgagee had inſured her from *London* to *Marſeilles*, and from thence to a port in *Holland*: the maſter ſailed to *Marſeilles*, and inſtead of purſuing his voyage from thence, went to the *Weſt Indies*, where he ſold the ſhip. The mortgagee brought his action at law upon the policy againſt the inſurer for the damages. The latter filed a bill in Chancery, praying an injunction on the ground that the mortgagor was to be conſidered as the owner of the ſhip in equity, and that the owner of the ſhip could not be guilty of a barratry; and Lord *Hardwicke* granted it. *Lewin* v. *Suaſſo*. *Park*, 94.

11. If the parties inſert in the policy the words *in any lawful trade*, if the captain commit barratry by ſmuggling, the underwriters are anſwerable; for otherwiſe the word barratry ſhould be ſtruck out of the policy. And the ſtipulation reſpecting the employment of the ſhip in a lawful trade, means the *trade* on which ſhe is ſent by the owners. *Havelock* v. *Hancil*, upon demurrer, 3 *Term Rep.* 277.

12. The voyage inſured was from *Jamaica* to *New Orleans*, which lies up the river *Miſſiſſippi*, and the captain proceeded on his voyage as far as the mouth of that river, and then dropped anchor, and went up the river in his boat for a fraudulent purpoſe of his own. The court of K. B. held, that the dropping anchor with ſuch fraudulent intent was an act of *barratry*, and not merely a deviation. *Roſs* v. *Hunter*, 4 *Term Rep.* 33.

13. If the captain of a ſhip, contrary to his owner's inſtructions, cruize for and take a prize, and the veſſel is afterwards loſt in conſequence, he is guilty of barratry, though a libel be brought for prize in the court of Admiralty in the name of himſelf and owner, and though the owner had procured a letter of marque ſolely with a view to encourage ſeamen to enter, and without any intention of uſing it for the purpoſes of cruizing; for whatever is done by the captain to defeat or delay his performance of the voyage, is barratry in him, it being to the prejudice of his owners; and though the captain might conceive that it was for their benefit, yet it was barratry, as he acted contrary to his duty. *Moſs* v. *Byrom*, 6 *Term Rep.* 379.

Of Partial Loſſes, and of Adjuſtment.

1. PARTIAL loſs is a damage which the ſhip may have ſuſtained in the courſe of the voyage from any of the perils mentioned in the policy. It alſo means any damage which the cargo may have received without any fault of the maſter, by ſtorm, ſtranding, capture, or ſhipwreck, although the whole or the greater part thereof may arrive in the port. *Park*, 101.

2. Theſe

2. Theſe partial loſſes fall upon the owners of the property ſo damaged, who muſt be indemnified by the underwriter. *Ibid.* 2 *Burr.* 1172.

3. The underwriters of *London* declare by a *memorandum* at the foot of their policy, that they will not anſwer for partial loſſes not amounting to 3 *per cent.* *Ibid.*

4. But they undertake to indemnify againſt loſſes, however inconſiderable, which ariſe from a general average. *Ibid.*

5. It is not fully explained in what caſes and in what manner the damage ariſing from a partial loſs ſhall be deemed to exceed 3 *per cent.* Thus, if a merchant has ſhipped 101 cheſts of goods, of which on arrival 3 cheſts are by ſome accident ſo ſpoiled as to be worth nothing; if the damage be calculated as on the whole value of 101 cheſts, it will not exceed 3 *per cent.*; and it is thought by moſt inſurers not to be recoverable in ſuch a caſe by the inſured, eſpecially if the inſurance be made without expreſsly declaring in the policy the particular ſum inſured on each cheſt. 1 *Magens*, 73. *Park*, 102.

Vid. Nesbitt v Lushington, 4 Term Rep. 786.788.

6. Action on a policy upon goods, conſiſting of ſugars, coffee, and indigo, which were valued in the policy, the ſugars at 30*l.* *per* hogſhead. The ſugars warranted free from average (that is, partial loſs) under 5*l.* *per cent.*, and all other goods free from average under 3*l.* *per cent.*, unleſs general, or the ſhip be ſtranded. When the ſhip arrived at her port of delivery, it appeared that every hogſhead of ſugar was damaged. This made it neceſſary to ſell them immediately. When the difference between the price they brought on account of the damage, and that which they might have been ſold for there, if they had been ſound, was as 20*l.* 8*d.* *per* hogſhead to 23*l.* 7*s.* 8*d.* *per* hogſhead. The queſtion was, by what meaſure the damages under all the circumſtances of the caſe ought to be eſtimated. The court of B. R. were of opinion, that the rule of eſtimating the loſs upon a valued policy was, that the inſurer ſhall pay to the inſured the like proportion of the ſum at which the goods are valued in the policy, as the price of the damaged goods bear to the price of the ſame goods, had they arrived undamaged at the port of delivery, *when* they are landed there. And this proportion is equally the rule, whether the goods come to a riſing or a falling market. Thus if the value in the policy be 30*l.* the goods are damaged, but ſell for 40*l.*; if they had been ſound they would have ſold for 50*l.*; the difference between the ſound and the damaged is a fifth, conſequently the inſurer muſt pay a fifth of the value in the policy, or 6*l.*, and ſo *e converſo* if they come to a falling market. *Lewis & al.* v. *Rucker*, 2 *Burr.* 1167.

7. The inſurer has nothing to do with the riſe or fall of the market, or with the ſpeculations of the merchant; he is only to put him in the ſame coudition (relation being had to the prime coſt or value in the policy) as he would have been in if the goods had arrived free from damage: which duty accrues upon the

ship's arrival and landing her cargo at the port of delivery, 2 *Burr.* 1167.

8. Since 19 *G.* 2. the constant usage has been to let the valuation, fixed in the policy, remain in case of a total loss, unless the defendant can shew, that the plaintiff had a colourable interest only, or that he has greatly over-valued the goods; but a partial loss opens the policy. *Park*, 111. cites *Erasmus* v. *Banks*. *Smith* v. *Flenney*, *M.* 21 *G.* 2.

9. Where no valuation is stated in the policy, the invoice of the cost, with the addition of all charges and the premium of insurance, shall be the foundation upon which the loss is to be computed. *Park*, 104. *Dick et al.* v. *Allen*, *Guildhall*, *Mich.* 1785. *cor. Buller*, J.

1 Magens, 27.

10. The underwriters of *London* have, by words inserted in their policy, declared that they will not be answerable for any partial loss happening to corn, fish, salt, fruit, flour, and seed, unless it arise by way of a general average, *or in consequence of the ship's being stranded.* These last words are left out by the two chartered assurance companies. *Park*, 112.

Cantillon v. The London Assur. Comp. cited 3 Burr. 1553.

11. "*Corn*" is a general word, and includes many particulars, as peas and beans. *Mason* v. *Shurray*, *Park*, 112.

12. The term "*Salt*," does not include saltpetre. *Per Wilson*, J. *Journu* v. *Bourdieu*. Sittings in C. B. *Easter*. 27 *G.* 3. *Park*, 113.

13. Action on a policy of insurance upon a cargo of wheat, being in the common form, and with the usual clause, "that corn, *&c.* "should be warranted free from average *unless general, or the ship* "*be* stranded." The ship was greatly damaged by a violent storm, and obliged to run to the first port to refit, the expences of which the insurer paid as being a general average. The wheat had been damaged by the storm, and the action was brought against the insurer to recover the amount of this damage. It was argued for the plaintiff, that this warranty ought only to take place if neither of the two specified events should happen. But if either did happen, (as was the case here, there being a general average loss,) then the warranty to be free from average was thereby discharged, and left the insurer liable to all other average. But the court were of opinion that "*unless*" meant the same as *except*, and could not be construed as a condition in the sense contended for by the plaintiff. *Wilson* v. *Smith*, 3 *Burr.* 1550.

14. So where a cargo of fish was so damaged by a storm as to be rendered of no value, and there was also a general average loss; the court were of opinion, that the insurer engaged only against a total loss, unless the ship be stranded; that a total loss of the thing insured was the *absolute destruction of it* by the wreck of the ship; that if the fish came to port, though stinking, yet as the commodity specifically remained, the underwriter was discharged. *Cocking* v. *Fraser*, *B. R. Easter*. 25 *G.* 3. *Park*, 115.

15. Action

15. Action on a policy of inſurance on goods (containing ſuch an exceptive clauſe) to recover for a total loſs. The cargo was peas, which arrived at the port of deſtination, but ſo damaged that the produce of them was three-fourths leſs than the freight due. It was proved at the trial to be the uſage, that if the ſpecific thing came to the market, although a loſs happened amounting to a total one, yet the underwriter was held diſcharged. Lord *Mansfield* held that the uſage explained the general words in the memorandum, and that every man, who contracts for a policy, does it as if the point of uſage were inſerted in his contract in *terms*; and there was a verdict for the defendant. *Maſon* v. *Shurray*, *Hil.* 1780. *at Guildhall. Park*, 116.

Boyfield v. Brown, 2 Stra. 1065. is *contrà*, but that caſe was decided prior to the inſertion of this memorandum in the policy. Ib.

Of general or groſs Average.

1. ALL loſſes ſuſtained and expences incurred voluntarily and deliberately with a view to prevent a total loſs of the ſhip and cargo ought to be brought into a general or groſs average, in which all who are concerned in ſhip, freight, and cargo are to bear an equal or proportionable part, and it muſt be made good by the inſurers in ſuch proportions as they have underwritten. *Park*, 122-124.

Roccus de Aſſecurationibus. Not. 62.

2. Cutting away maſts, or throwing overboard goods in a ſtorm to lighten the veſſel, damages ſuſtained by thoſe on board from ſuch jettiſon, damages ſuſtained in defending a ſhip againſt an enemy or pirate, the expence of curing the men wounded in ſuch defence, and the ſum the maſter may have promiſed to pay to a privateer or pirate to ranſom his ſhip when taken, and the like, are general average loſſes. *Ibid.*

3. There can be no contribution without the ejection of ſome goods and the ſaving of others. But it is not always neceſſary for that purpoſe that the ſhip ſhall arrive at the port of deſtination. *Ib.* 123.

4. If the jettiſon does not ſave the ſhip, there ſhall be no contribution of ſuch goods as may happen to be ſaved. But if the ſhip be once preſerved by ſuch means, and, continuing her courſe, be afterwards loſt, the property ſaved from the ſecond accident ſhall contribute to the loſs ſuſtained by thoſe whoſe goods were caſt out upon the former occaſion. *Ib.* 123.

Ord. Law. 14. tit. Contribution, Art. 15, 16. Ord. of Hamb. 2. 2 Mag. 240. Ord. of Rotterdam, 2 Magens, 98. Writers on inſurance are not perfectly agreed on this point. Vid. 1 Magens, 56.

5. Sailors' wages and victuals, while a ſhip is performing quarantine, unleſs it be an extraordinary one, ſhall not be brought into a general average. *Ib.* 125.

Magens, 67.

6. Though the charges of unloading a ſhip, in order to get her into a river or port, ought not to be brought into a general average, yet they may when occaſioned by an indiſpenſible neceſſity

sity to prevent the loss of the ship and cargo. As when a ship is forced by storm to enter a port to repair the damage she has suffered, if she cannot continue her voyage without an apparent risk of being lost; the wages and victuals of the crew are brought into an average from the day it was resolved to seek a port to refit the vessel to the day of her departure from it, with all the charges of unloading, reloading, anchorage, pilotage, and every other expence incurred by this necessity. *Beawes*, 150. quoted by *Buller*, J. in *Da Costa* v. *Newenham*, 2 *Term Rep.* 407. *Lateward* v. *Curling*, *Park*, 125.

Of the adjustment.

7. When the quantity of damage sustained in the voyage is known, and the amount which each underwriter upon the policy is liable to pay is settled, it is usual for the underwriter to indorse on the policy "*adjusted this loss at so much per cent.*" or words to that effect. This is called an adjustment. *Park*, 117.

8. If he refuse to pay after this, the owner has no occasion to go into the proof of his loss, or any of the circumstances respecting it. *Ibid.*

9. Action on a policy of insurance. A loss having happened, the defendant, who was the insurer, had settled the amount, and underwrote the policy in these words: "Adjusted the loss on this policy at ninety-eight pounds *per cent.*, which I do agree to pay one month after date." This he signed with his name. When the note became due, the defendant insisted on fuller proof of the warranty annexed to the policy being complied with. At the trial *Lee* C. J. was of opinion, that this was to be considered as a note of hand, and that the plaintiff had no occasion to enter into the proof of the loss, and he had a verdict thereupon. *Hog* v. *Gouldney*, *at Guildhall*, *Trin.* 1745. *Beawes Lex Merc.* 310. *Hewit* v. *Flexney*, S. P. *ibid.* 308.

10. Action on a policy on a foreign ship, in which there was a stipulation "that the policy shall be sufficient proof of interest;" and judgment by default. On a motion to set aside the writ of inquiry executed thereon, the court of K. B. were of opinion, that the underwriter having suffered judgment to go by default, had confessed the plaintiff's title to recover, and the amount of the loss being fixed by his own stipulation in the policy, the defendant needed only to prove the plaintiff's subscription to the policy to the jury. *Thelluſſon* v. *Fletcher*, *Dougl.* 301.

11. If an insurer pay money for a total loss, and in fact it be so at the time of the adjustment, and if it afterwards turn out to be only a partial loss, he shall not recover back the money so paid to the insured. *Da Costa* v. *Firth*, 4 *Burr.* 1996.

12. An armed force boarded a ship, in consequence of which she was stranded: the principal part of her cargo, consisting of corn, was taken by the mob at their own price. This loss cannot be recovered as for a general average; but for such part as was damaged in consequence of the stranding, and thrown overboard, the insurer may recover upon a count stating the loss to be by stranding. *Neshitt & al.* v. *Lushington*, 4 *Term Rep.* 783.

13. Where

13. Where a ſhip is obliged to go into port for the benefit of the whole concern, the charges of loading and unloading the cargo and taking care of it, and the wages and proviſions of *the workmen hired for the repairs*, become general average. *Da Coſta v. Newenham*, 2 *Term Rep.* 407.

14. The moſt valuable goods, though their weight ſhould be incapable of putting the ſhip in the leaſt hazard, as diamonds, &c., muſt be valued at their juſt price to this contribution. *Park*, 126. Peters v. Milligan, at G. Hall, Mich. 1787. cor. Buller, J. Park, 129.

15. Neither the perſons of thoſe in the ſhip, nor the ſhip proviſions, nor *reſpondentia* bonds, nor wearing apparel in cheſts and boxes, nor ſuch jewels as belong to the perſon, nor the wages of ſailors, are to contribute to the general loſs. *Ibid.* 127. 1 Mag. 71.

16. The ſhip, freight, and cargo are by cuſtom in *England* to bear an equal and proportional part of the loſs ariſing from what is thus ſacrificed for the common good. *Park*, 127. *Da Coſta v. Newenham*, 2 *Term Rep.* 407.

17. The way of fixing a right ſum by which the average ought to be computed, is by examining what the whole ſhip, freight, and cargo, if no jettiſon had been made, would have produced neat if they had been ſold for ready money. And this is the ſum whereon the contribution ſhould be made, all the particular goods bearing their net proportion. 1 *Mag.* 69.

18. In *England*, the cuſtom has become general of eſtimating the goods ſaved and loſt at the price for which the goods ſaved were ſold. *Park*, 128.

19. The contribution is in general not made till the ſhip arrive at the place of delivery; but accidents may happen which may cauſe a contribution before ſhe reach her deſtined port: as when a veſſel has been obliged to make a jettiſon, or by damages ſuffered ſoon after ſailing is obliged to return to her port of diſcharge. The expences ariſing from hence may be then ſettled by a general average. *Park*, 129.

Of Salvage.

1. SALVAGE is an allowance made for ſaving a ſhip or goods, or both, from the dangers of the ſeas, fire, pirates, or enemies. *Beawes Lex Merc.* 146.

It is alſo ſometimes uſed to ſignify the thing itſelf which is ſaved. *Ib.*

2. In an action of trover, brought for goods which were in a ſhip which took fire, the defendants refuſing to deliver them up until they were paid ſalvage, *Holt* C. J. was of opinion, that the defendants might retain them until ſalvage was paid, as well as a ſtaylor, hoſtler, or common carrier their reſpective articles, *Hartfort v. Jones*, 1 *Ld. Raym.* 393. 2 *Salk.* 654.

3. In

Made perpetual 4 G. 2. c. 12.

3. In cases of wreck, 12 *Ann. stat.* 2. *c.* 18. does not fix the rate of salvage, but ordains that it shall be *reasonable*; that is, it must be a sufficient recompence to those who have encountered dangers for the preservation of the ship and cargo, regard being at the same time had to the circumstances of the owner of the property saved, and it is to be ascertained by three justices of peace. *Park*, 135.

Sect. 5.

4. By 26 *G.* 2. *c.* 18. Any person not employed by the master, *&c.* in the salvage of a ship, *&c.* and saving them in the absence of those so employed, or giving information to a justice of peace, magistrate, customhouse or excise officer, where any goods or effects belonging to a vessel wrecked, *&c.* are wrongfully bought and sold, or concealed, then such person or persons shall be entitled *to a reasonable reward for such services*, to be paid by the masters or owners, and to be adjusted in case of a disagreement about the *quantum*, in like manner as the salvage is to be adjusted by 12 *Ann.*

Sect. 6. "And for the better ascertaining the salvage to be paid in pursuance of the present act, and the act before-mentioned, and for the more effectual putting the said acts in execution, the justice of the peace, mayor, bailiff, collector of the customs, or chief constable, who shall be nearest the place where any ship, goods, or effects, shall be stranded, or cast away, shall forthwith give public notice, for a meeting to be held as soon as possible, of the sheriff or his deputy, the justices of the peace, mayors or other chief magistrates of towns corporate, coroners, or commissioners of the land tax, or any five or more of them, who are hereby empowered and required to give aid in the execution of this and the said former act, and to employ proper persons for the saving of ships in distress, and such ships, vessels, and effects as shall be stranded or cast away; and also to examine persons upon oath touching or concerning the same, or the salvage thereof, and to adjust the *quantum* of such salvage, and distribute the same among the persons concerned in such salvage, in case of disagreement among the parties, or the said persons; and that every such magistrate, *&c.* attending and acting at such meeting, shall be paid four shillings a-day for his expences in such attendance, out of the goods and effects saved by their care or direction."

5. "Provided, that if the charges and rewards for salvage, directed to be paid by the former statute and by this act, shall not be fully paid, or sufficient security given for the same, within 40 days next after the said services performed, then it shall be lawful for the officer of the customs concerned in such salvage, to borrow or raise so much money, as shall be sufficient to satisfy and pay such charges and rewards, or any part thereof then remaining unpaid, or not secured as aforesaid, by or upon one or more bill or bills of sale, under his hand and seal, of the ship or vessel or cargo saved, or such part thereof as shall be sufficient, redeemable upon payment of the principal sum borrowed, and interest for the same at the rate of 4 *per cent. per annum.*"

6. The

6. The act makes further proviſion as to the perſons who are to put it in execution. *Sect.* 9 & 10.

7. It puniſhes with tranſportation for ſeven years any perſon aſſaulting a magiſtrate or officer when in the exerciſe of his duty reſpecting the preſervation of any ſhip, *&c.* Sect. 11 & 12.

8. In caſe of a capture of any ſhip, boat, or any goods therein, which ſhall be proved in the court of Admiralty to belong to any of his majeſty's ſubjects of any territories continuing under his protection and obedience, by any of his majeſty's enemies, and they be again retaken, every ſhip, *&c.* and every part thereof belonging to ſuch ſubject, ſhall by decree of the court of Admiralty, be reſtored to the former owner, he paying in lieu of ſalvage, if taken by one of his majeſty's ſhips of war, *an eighth part of the true value of the ſhips, veſſels, boats, and goods ſo to be reſtored;* if taken by a privateer or other veſſel, after having been in the poſſeſſion of the enemy twenty-four hours, one *eighth part* of the true value; if above twenty-four hours and under forty-eight, a *fifth part* thereof; if above forty-eight hours and under ninety-ſix, a *third part* thereof; and if above ninety-ſix hours, a *moiety thereof.* And if ſuch ſhip ſo retaken ſhall appear to have been, after the taking by the enemy, by them ſet forth as a man of war, the former owners to whom it is to be reſtored, ſhall pay for ſalvage the full moiety of the true value of the ſaid ſhip ſo taken, without deduction. 13 G. 2. c. 4. ſect. 18. 29 G. 2. c. 34. ſ. 24.

9. The wearing apparel of the maſter, and ſeamen are always excepted from the allowance of ſalvage. *Beawes Lex Merc.* 147.

10. The valuation of the ſhip, in order to aſcertain the rate of ſalvage, may be determined by the policy of inſurance, if there be no reaſon to ſuſpect ſhe is undervalued; and the ſame rule may be obſerved as to goods where there are policies upon them. If that however ſhould not be the caſe, the ſalvers have a right to inſiſt upon proof of the real value, which may be done by the merchant's invoices, and they are to be paid accordingly. *Beawes*, 147. *Park*, 140.

11. The inſurers, by their contract, expreſsly agree to indemnify the inſured againſt the charges of ſalvage. *Ib.*

12. Action on a policy of inſurance inſuring goods on the ſhip *A.* The plaintiffs declared, that the ſhip ſprung a leak and ſunk in the river, whereby the goods were ſpoiled; the evidence was, that many of the goods were ſpoiled; but ſome were ſaved. The queſtion was, Whether the plaintiffs might give in evidence the expences of ſalvage; that not being particularly ſtated in the declaration, as a breach of the policy, and held by Lord *Hardwick* that they might. For the inſurance is againſt all accidents, and the accident laid is, that the ſhip ſunk in the river, and it lays a ſpecial damage beſides, that the goods were ſpoiled, but it is a common caſe that the plaintiff may give in evidence any damage that is within his cauſe of action notwithſtanding. *Carey* v. *King, Caſes in B. R. Temp. Hardw.* 304.

13. The

13. The inſured is only entitled to an indemnity, and ſhall not receive a double ſatisfaction for the ſame loſs. Therefore where the king granted letters of repriſal on the *Spaniards* for the benefit of his ſubjects, in conſideration of the loſſes they had ſuſtained by unjuſt captures; Lord Chancellor *Hardwicke* held, that the inſurers had a right to part of the prizes and not the owners, they having been already ſatisfied by the former, and that if the goods had been reſtored in *ſpecie*, or compenſation made for them, the inſured would ſtand as a truſtee for the inſurer in proportion for what he paid. *Randal* v. *Cockran*, 1 *Veſ.* 98.

Of Abandonment.

1. WHEN the thing inſured is by ſome of the uſual perils become of ſo little value as to entitle the inſured to call upon the underwriter to accept of what is ſaved and to pay the full amount of his inſurance, as if a total loſs had actually happened, he is then ſaid to have a right to abandon. *Park*, 143.

2. The abandonment muſt be total and not partial of any particular part of the property inſured. But in all caſes the inſured has a right to elect whether he will abandon or not. *Ib.* 144. 2 *Burr.* 697. 1211.

3. An inſured ſhip was taken by a *Spaniſh* privateer, retaken by an *Engliſh* one and carried into *Boſton* in *New England*, where no perſon appearing to give ſecurity, or to anſwer the moiety due for ſalvage, ſhe was condemned and ſold in the court of Admiralty there. The recaptors had their moiety, and the overplus money remained in the hands of the officers of the court. In an action on the policy the inſured had a verdict. On a bill being filed by the inſurer, praying an injunction, Lord *Hardwicke* C. refuſed it, ſaying, that the inſured having offered, and being willing to relinquiſh his intereſt in the ſalvage, he ought to recover the whole money inſured. Otherwiſe upon a recapture a man would be in a worſe ſituation than if the ſhip were totally loſt. *Pringle* v. *Hartley*, 3 *Atk.* 195.

23 G. 2. c. 4. ſ. 18.

It was alſo mentioned per Canc. that there was an agreement to go to trial in one of the actions, and to be bound by the event, and that all the circumſtances of the caſe were known *then* to the parties.

4. Policy of inſurance on a ſhip and on the cargo (by two diſtinct policies) from *Newfoundland* to *Portugal* or *Spain*, &c. The ſhip was to be valued at the ſum ſubſcribed. The cargo was fiſh and other merchandize. Part of it was thrown overboard in a ſtorm to preſerve the reſt. The ſhip was taken by the enemy afterwards. The maſter, mates, and all the ſailors (except an apprentice and a landman) taken out and carried to *France*; the ſhip remained in the hands of the enemy *eight days*, and was then retaken by a *Britiſh privateer*, and brought into *Milford Haven*; immediate notice was given by the inſured to the inſurers, with an offer to abandon the ſhip and cargo. The ſhip had been ſo far diſabled by a ſtorm, as to render her incapable of proceeding on her deſtined voyage without going into port to refit. The court held, that

that this was a total loss, and that the insurers had a right to abandon. *Goss* v. *Withers*, 2 *Burr.* 683.

5. Action on a policy of insurance from *Montserrat* to *London*: the question was, whether the insured should recover a total or an average loss. The facts were, that the ship was captured on her voyage by two *American* privateers, who took the captain, all the crew, and part of the cargo, which consisted of sugars, out of her. The rigging was also taken away. She was afterwards retaken and carried into *New York*, where the captain arriving to take possession of her on 23d *June*, found part of the cargo washed overboard, 57 hogsheads of what remained damaged, the ship so leaky that she could not be repaired without unloading entirely. The owners had no storehouses there where the sugars could be put, nor any agent to direct the captain. No sailors could be had. The salvage amounted to the value of 40 hogsheads of sugar, which he could only pay by a sale of part of the cargo. The captain did not know of the insurance. If he had repaired the ship, his expences would have exceeded the freight 100*l.* There was an embargo on all vessels at *New York* till *December*. The ship was to have arrived at *London* the preceding *July*. The captain on consulting his friends resolved to sell the ship and cargo; the latter of which was paid for, and the former left at *New York*. On his arrival in *England* he gave the plaintiff an account of what he had done, which was the first notice he received, and he immediately claimed for a total loss, and offered to abandon. Lord *Mansfield* told the jury, that if they were satisfied that the captain had done what was best for the benefit of all concerned, they must find *as for a total loss*, which they did; and on a motion for a new trial, the court were of the same opinion. *Milles* v. *Fletcher*, *Dougl.* 219.

6. Action on a policy of insurance on ship and goods from *Virginia* or *Marylayd* to *London*. The ship having on board 192 hogsheads of tobacco, was taken by a *French* privateer on 6th of *May*, while on her voyage to *London*. The privateer left only the mate and one man on board out of nine hands. She was retaken on her way to *France*, on the 23d, by an *English* man of war, and sent into *Plymouth* on 6th of *June*. The plaintiff, when he heard of this, wrote a letter to his agent in *London*, desiring him to acquaint the defendant "that he did from thence abandon to him his interest in the said ship as to the said 100*l.* by the defendant insured." The insurer refused to take to the ship, but offered to pay the salvage and all other losses that the plaintiff sustained by the capture. The ship sustained no damage by the capture, and the whole cargo was delivered to the freighters at the port of *London*, who paid the freight without prejudice. The court of K. B. were of opinion, that as the event had fixed the loss to be an average one before the action brought, before the offer to abandon, and before the plaintiff had notice of any accident, and consequently before he could make any election, he

could recover for an average loss only, and not a total one. *Hamilton* v. *Mendez*, 2 *Burr.* 1198. 1 *Black.* 296.

Guidon, c. 7 s. 1.

7. The right to abandon must arise upon the object of the insured being so far defeated, that it is not worth his while to pursue it: such a loss as is equally inconvenient to him as if it had been total. For instance, if the voyage be absolutely lost, or not worth pursuing; if the salvage be very high, *suppose one half*; if further expence be necessary; if the insurer will not engage at all events to bear that expence, though it should exceed the value, or fail of success. Under these and like circumstances the insured may abandon, notwithstanding there has been a recapture. *Park*, 145. 2 *Burr.* 1209.

8. If a ship be taken and escape immediately, which would be no hindrance at all to the voyage, or should be instantly ransomed, which would amount only to a partial loss, the insured shall not be allowed to abandon, and demand recompence for a total loss. 2 *Burr.* 697. *Ibid.* 1213.

9. The right to abandon must depend upon the nature of the case at the time of the action brought, or at the time of the offer to abandon, because the insurer ought never to pay less on a contract of indemnity than the value of the loss; and the insured ought never to gain more. *Hamilton* v. *Mendez*, 2 *Burr.* 1214.

10. In the *English* court of admiralty the property was not changed by capture till after sentence of condemnation. 2 *Burr.* 693, 694. *Ibid.* 1208, 1209.

11. By 29 *G.* 2. *c.* 34. *s.* 24. the *jus postliminii* on a recapture continues for ever. *Ibid.* 1209.

12. The question is immaterial between insurer and insured, and can never happen but in two cases, between the owner and a neutral vendee; or between the owner and a recaptor. *Ibid.* and 2 *Burr.* 693.

13. In general, though not universally, if an insured ship be taken the insured may demand as for a total loss and abandon. So he may also in case of an arrest, or an embargo by a prince not an enemy. 2 *Burr.* 696. *Ibid.* 1212.

14. But then he must make his election while the things insured are in jeopardy, for if it be known that they are got out of it, suffering only a partial loss before he does so, he cannot abandon.

15. Action on a policy of insurance subscribed by defendant for 100*l.* Plea of tender, and 48*l.* paid into court. The case reserved stated, that the damage sustained by the ship in the voyage insured did not exceed that sum: but that when the ship arrived at her port of delivery she was not worth repairing. The question was, whether the plaintiffs had a right to abandon. *Per cur.* They cannot. The jury have found that the damage sustained did not amount to more than 48*l. per cent.* We are precluded from saying that this is a total loss. *Cazalet & al.* v. *Barbe*, 1 *Term Rep.* 187.

16. There

16. *There is no caſe in which the owner can abandon, unleſs at ſome period or other of the voyage there has been a total loſs. Per Buller,* J. *Ibid.*

17. Action on a policy of inſurance on the *Prince of Wales*, in port or at ſea, for 6 months, from the 18th of *July*. The ſhip was bound to *Quebec*, where ſhe arrived, but the ſeaſon being too far advanced before ſhe was ready to return, ſhe was removed into the baſon. On 19th *November* ſhe was driven from thence by a field of ice, and damaged by running on the rocks. She was found to be then bulged and much injured, but not thought irreparably ſo. In the progreſs of the repair difficulties aroſe from want of materials, and the captain, after conſulting the agents and merchants, ſold her. The court were of opinion that the loſs in *November* ſhould be taken as an average, not a total one. *Furneaux* v. *Bradley*, *Eaſt.* 20 *G.* 3. *Park*, 166.

18. Policy on ſhip, freight, and goods from *Tortola* to *London*, warranted to depart on or before the 1ſt of *Auguſt*. On that day the ſhip got under way, but not being able to get clear of the iſlands, they caſt anchor during the night and got clear the next day, when ſeveral ſqualls of wind ariſing the ſhip made water ſo faſt as to keep the crew at both pumps. On the 3d, ſhe was obliged to return in diſtreſs to *Tortola*, and a ſurvey being had the ſhip was declared unable to proceed to ſea with her cargo, and that ſhe could not be repaired in any of the *Engliſh* iſlands in the *Weſt Indies*. Many of the ſugars were waſhed out, and ſeveral of the caſks broke. The ſhip and cargo were therefore ſold at *Tortola*. The court were of opinion that this was a total loſs of the *ſhip*, as ſhe received an irreparable hurt; of the *cargo*, becauſe the voyage was wholly loſt; and of the *freight* alſo, becauſe the ſhip could not perform the voyage. *Manning* v. *Newenham*, *Trin.* 22 *G.* 3. *Park*, 168.

19. Where the inſured has an election to abandon, no right to ſue as for a total loſs can veſt in him, until he has made that election, and he cannot elect before advice is received of the loſs. *Hamilton* v. *Mendes*. *Per* Lord *Mansfield*. 2 *Burr.* 1211.

20. As ſoon as the inſured receive accounts of ſuch a loſs as entitles them to abandon, they muſt in the firſt inſtance make their election whether they will abandon or not; and if they do, they muſt give the underwriters notice in a reaſonable time, otherwiſe the ywaive their right to abandon, and can never afterwards recoveras for a total loſs. *Mitchel* v. *Edie*, 1 *Term Rep.* 608.

21. But if the inſured, hearing that his ſhip is much diſabled and has put into port to repair, expreſs his deſire to the underwriters to abandon, and be diſſuaded from it by them, and they order the repairs to be made; they are liable to the owner for all the ſubſequent damage occaſioned by that refuſal, though it amount to the whole ſum inſured, for they have by their own act ſuperſeded the neceſſity of notice. *Da Coſta* v. *Newenham*, 2 *Term Rep.* 407.

Of Fraud in Policies.

1. THE ſhip ſailed from *Jamaica* for *London* in *November*, after which an inſurance was made, and the agent told the inſurer that the ſhip ſailed the latter end of *December*. *Lee* C. J. held it to be a fraud, and defendant had a verdict. *Roberts* v. *Fonnereau*, at *Guildhall*, *Trin.* 1742. *Park*, 176.

2. A falſe aſſertion vitiates the contract, though the loſs happen in a mode not affected by the falſity, as where the inſured warranted "a neutral ſhip and property," they being not ſo in fact, and the ſhip was loſt in a ſtorm. The court were of opinion he could not recover. *Woolmer* v. *Muilman*, 3 *Burr.* 1419. 1 *Black.* 427.

3. So where a ſhip was warranted *Portugueze*, and condemned in *France* as not being ſo, the contract of inſurance was held to be void. And the plaintiff having by an anſwer in Chancery admitted that ſhe was condemned as not being *Portugueze*, that, together with the ſentence of condemnation, in which it was ſaid *that the ſhip was condemned in the court of prizes*, was held ſufficient evidence to ſhew the ground on which ſhe was condemned, without atteſted copies of the libel. *Fernandes* v. *De Coſta*, *Sittings Hil.* 4 *G.* 3. *Park*, 177.

4. The concealment of circumſtances vitiates a contract of inſurance, though not done with any fraudulent intention, for the riſk inſured is not the ſame which the underwriters intended. 3 *Burr.* 1909.

5. One having heard that a ſhip deſcribed like his was taken, inſured her without giving notice to the inſurers of what he had heard. On a bill for an injunction to be relieved againſt the inſurance as fraudulent, Lord *Macclesfield*, C. thought the concealment a fraud, and decreed the policy to be delivered up with coſts, but the *premium* to be allowed out of them. *Da Coſta* v. *Scandret*, 2 *P. Wms.* 170.

6. Action on a policy of inſurance. It appeared that the agent for the plaintiff had on 23d *Auguſt* (two days before he effected the policy) received a letter, dated 21ſt *Auguſt*. "On the 12th of this month I was in company with the ſhip in queſtion, at twelve at night loſt ſight of her at once, the captain told me he was leaky, and the next day we had a hard gale." The ſhip was taken on the 19th by the *Spaniards*. There was no pretence of any knowledge of the actual loſs at the time of the inſurance, but it was made in conſequence of a letter received that day from the plaintiff abroad, dated 27th *June*. *Lee*, C. J. declared that each party ought to know all the circumſtances known at the time of the contract, and the defendant had a verdict. *Seaman* v. *Fonnereau*, 2 *Stra.* 1183.

7. Ship inſured "at and from *Genoa* to *Dublin*, the adventure to begin from the loading to equip for this voyage." The load-

ing

ing had been put on board at *Leghorn*, but the ship had lain in *Genoa* five months for want of a convoy. This circumstance was not communicated to the underwriter. The court held that the policy implied that *Genoa* was the loading port, which not being true, the contract was void. *Hodgson* v. *Richardson*, 1 *Black. Rep.* 463.

8. On the 2d *October* the ship sailed from *St. Thomas* on the coast of *Africa*, and was taken on the 6th *December*. Plaintiff received news on the 22d *February* that the ship was well and had sailed on the 22d *October*. In the instruction given to the broker for the purpose of insurance, it was said, "that the ship was on the coast on the 2d *Oct.*" but said nothing of her having sailed from *St. Thomas*; and the plaintiff in his letter to one of the brokers said, he would be glad to get 600*l.* on the ship as *she is rather long*. Lord *Mansfield* thought this a concealment of material information, and that the insurers were not liable. *Ratcliffe et al.* v. *Shoolbred*, *Sittings at Guildhall*, *Trin.* 1780. *Park*, 181.

9. So where the broker's instructions stated the ship ready to sail on the 24th of *December*, when she had sailed the 23d, Lord *Mansfield* said that this was a material concealment and misrepresentation, and the underwriter had a verdict. *Ellis* v. *Brutton*, *Sittings at Guildhall*, *Hil.* 1782.

10. The policy would be equally void against the underwriter if he concealed any thing. *Per* Lord *Mansfield*. *Carter* v. *Boehm*, 3 *Burr.* 1909.

11. There are many matters as to which the insured may be innocently silent.

12. He needs not mention what the underwriter knows.

13. Nor what the underwriter ought to know; and he is bound to know every cause which may occasion natural perils, as the difficulty of the voyage, the kind of season, *&c.* as also every cause which may occasion political perils, as the rupture of states, the operations of war, the probability of peace, *&c.* If he insure private ships of war by sea and on shore, from ports to ports and places to places any where, he need not be told the secret enterprises on which they are destined.

14. He need not be told what lessens the risk agreed and understood to be run by the express terms of the policy; as if he insure for three years, he needs not be told a circumstance to shew it will be over in two.

15. He need not be told the opinions of the insured on political or other appearances; for each man professes to act on his own skill and sagacity, and therefore neither needs to communicate to the other. *Per* Lord *Mansfield*. *Carter* v. *Boehm*, 3 *Burr.* 1910, 1911.

16. Where an insurance is entered into for the benefit of the governor of a fort, he need not disclose the condition of the place; nor his belief that from the enemy not being able to relieve their friends on the coast they might make him a visit, for it is a mere speculation of his; nor a letter he received mentioning the design

they had to attack him the year before. 3 *Burr.* 1910, 1911. and 1 *Black.* 593.

17. Action on a policy of insurance. The goods were insured on board a ship from *London* to *Nantz*, with liberty to call at *Ostend*. She was cleared only for *Ostend*, but sailed directly for *Nantz*, that being the known course of the trade, to save certain duties both in *England* and *France*. *Per cur.* This is no fraud on the underwriter, and does not vacate the policy. *Planche et al.* v. *Fletcher*, *Dougl.* 238.

18. The insurance was made before the commencement of hostilities, but when every body expected a war immediately. The insured is not bound to give the underwriter notice though the ship do not sail till after the war takes place, and there being a capture the underwriter was held liable. *Ib.*

19. So where a *Portugueze* vessel was captured and condemned in *France*, on the ground of having an *English* supercargo on board. The court held that not giving notice of this was not such a fraudulent concealment of circumstances as would vitiate the policy. *Mayne* v. *Walter*, *B. R. East.* 22 *G.* 3. *Park*, 193.

20. A warranty or condition makes part of the written policy, and must be strictly performed, as being a part of the agreement. *Per* Lord *Mansfield*. *Pawson* v. *Watson*, *Cowp.* 788.

21. A representation is a state of the case, not a part of the policy, but collateral to it and entirely independent of it, and it is sufficient if it be *substantially* performed. But if it be false, it will avoid the policy. *Park*, 196. *Cowp.* 788.

22. To make written instructions binding and valid as a warranty, they must be inserted in the policy. *Ib.* 790.

23. Action on a policy of insurance. The first underwriter had the following instructions shewn to him. "Three thousand five hundred pounds upon the ship *Julius Cæsar* for *Halifax*, to touch at *Plymouth*, and any port in *America*; *she mounts* 12 *guns and* 20 *men*. These instructions were not asked for, nor communicated to the defendant, but the ship was only represented *generally to him as a ship of force*. The ship was taken by a privateer, and had on board at the time six 4-pounders four 3-pounders, three 1-pounders, six half-pounders, which are called *swivels*, and 27 men and boys for her crew, but only 16 men. The witness said he considered her as of greater force than if she had 12 carriage guns and 20 men, and *there were neither men nor guns on board at the time of the insurance*. The court held that these instructions were merely a collateral representation, and if the parties had considered them as a warranty they would have inserted them in the policy; that it is not a fraudulent misrepresentation, but only a representation of what in the then state of the ship they thought would be the truth, and was substantially complied with, as the ship really did sail with a larger force; that consequently the policy was not void, and the insured was entitled to recover. *Pawson* v. *Watson*, *Cowp.* 785.

24. If

24. If a misrepresentation, both material and fraudulent, be made to the first underwriters, it is to be considered as a misrepresentation made to every one who signs subsequently, and infects the whole policy; for where a good man stands first the rest underwrite without asking a question. *Cowp.* 786.

25. Action on a policy of insurance on the ship *Carnatic*, "at and from *Port L'Orient* to the *Isles of France* and *Bourbon*, and to all and any ports or places where and whatsoever in the *East Indies*, *China*, *Persia*, or elsewhere beyond the *Cape of Good Hope*, from place to place and during the ship's stay and trade backwards and forwards, at all ports and places, and until her safe arrival back at her last port of discharge in *France*." But at the time this policy was subscribed there was a slip of paper wafered to it, and shewn to the underwriters, on which was written—"The ship has had a complete repair, and is now a fine and good vessel; three decks. Intends to sail in *September* or *October* next; is to go to *Madeira*, the *Isles of France*, *Pondicherry*, *China*, the *Isles of France* and *L'Orient*." The ship, instead of going from *Pondicherry* to *China*, went to *Bengal*, and touched at several places in her way thither and back, and was taken in her way home by a privateer. Lord *Mansfield* told the jury that this slip of paper was only a representation; that if they were satisfied that the real intention at the time of the representation was to go to *China*, and that it was not falsely held out with a fraudulent view, the plaintiff must have a verdict, for the insured might change his intention to go to *Bengal*, and yet be protected by the policy which admits of that voyage, and must be understood by both parties in a greater latitude than the representation, being expressed in more comprehensive terms. The plaintiff had a verdict. *Bize* v. *Fletcher*, *Dougl.* 271.

26. In getting a policy on the 30th *January* the broker represented the ship as safe in the *Delaware* on the 11th *December*. She had been lost there on the 9th *December*. This is a material misrepresentation, and makes the policy void, though it was not done fraudulently. *M'Dowall* v. *Fraser*, *Dougl.* 247. *Vid.* also S.P. *Shirley* v. *Wilkinson*, *Dougl.* 2 Edit. 293.

27. A representation that the ship is *expected* to sail from the coast of *Africa* on such a day, is not material so as to vitiate the policy, although it should afterwards appear that she actually sailed six months before. *Barber* v. *Fletcher*, *Dougl.* 292.

Of prohibited Goods.

1. BY 4 and 5 *W. & M. c.* 15. *sect.* 14. Any person undertaking, by way of insurance, to deliver, or delivering in pursuance of such insurance, any prohibited goods whatsoever to be imported from parts beyond seas into this kingdom, or any foreign goods, without paying the duty, forfeits 500*l.*

2. *Sect.* 15. Inflicts the like penalty upon persons agreeing to pay any sums of money for such insurance, or who shall receive or take such prohibited goods into their house, &c. or such other goods before the duties be paid, knowing thereof.

3. The 12 *G.* 2. *c.* 21. Inflicts the like penalty on persons insuring or being insured, as to the exportation of any wool, woolfels, &c. from *Great Britain* or *Ireland*.

4. By *sect.* 33. All policies of insurance on vessels laden with wool or woollen yarn from *Great Britain* or *Ireland*, or any other species of wool or woollen manufacture from *Ireland*, or on the goods themselves, are made void.

5 This latter act, as far as relates to *Ireland*, was repealed by 20 *G.* 3. *c.* 6.

6. The 28 *G.* 3. Inflicts a penalty of 50*l.* with six months solitary imprisonment for exporting wool, &c.; and *sect.* 45. declares that persons undertaking, by way of insurance, &c. that any articles specified in the statute shall be conveyed to parts beyond the seas, or who shall deliver them in pursuance of such agreement, their aiders and abettors shall suffer the like punishment.

7. *Sect.* 46. Inflicts a like penalty upon persons paying for such insurance.

Sect. 48. Declares all policies on these articles, or on a ship laden with them, to be void.

8. If an insurance be made to protect smuggled goods it would be of no effect: so if made on any voyage which was contrary to the navigation act.

13 Car. 2. c. 10. *Vide* also 2 W. & M. c. 9. s. 1. 7 Anne, c. 8. s. 12.

9. A person acting by the orders of the insured, and who is in anywise instrumental in procuring the insurance, is bound to disclose all he knows to the underwriter before the policy is effected; and if any material misrepresentation arises from his fraud or negligence, the policy is void, although the insured is not guilty of any improper conduct in the transaction. *Fitzherbert* v. *Mather*, 1 *Term Rep.* 12.

10. Where an issue was directed out of Chancery to try the validity of a policy, and the insurer had offered by his bill to pay back the premium, but had not paid it into court; the jury were of opinion against the policy, but found a verdict for the plaintiff, the insured, for the premium. The court of K. B. were of opinion, that the offer made by the complainant's bill was equivalent to the money's having been actually brought into court in the present case, and made a rule that the verdict found for the plaintiff be *vacated*, and one entered for the defendant. *Wilson* v. *Ducket*, 3 *Burr.* 1361.

11. Where the fraud of the insurer was very gross, Lord *Mansfield* declared that the premium should not be recovered from the underwriter. *Tyler* v. *Horne*, *at Guildhall*, *Hil.* 1785. *Park*, 218.

Of Sea-worthineſs.

1. BY an implied warranty every ſhip inſured muſt be tight, ſtaunch, and ſtrong; but it is ſufficient if ſhe be ſo at the time of her ſailing. She may ceaſe to be ſo in twenty-four hours after her departure, and yet the underwriter will continue liable. *Per* Lord *Mansfield*. *Eden* v. *Parkinſon*, *Doug*. 708.

2. The inſurers are not liable if the ſhip be not ſea-worthy at the commencement of the voyage, although the circumſtance was totally unknown to the inſured. *Mills* v. *Roebuck*, *Park*, 222. Le Guidon, c. 5. art. 8. 2 Mag. 90. 140. 2 Val. 81. 1 Val. 654.

3. Where the ſhip is not ſea-worthy the policy of inſurance is void, as well where the inſurance is upon the goods to be conveyed in the ſhip, as when it is upon the ſhip itſelf. *Park*, 231.

Of illegal Voyages.

1. AN inſurance on a voyage prohibited by ſtatute is void.

2. Action on a policy of inſurance on goods on board the *Venus*, "loſt or not loſt, at and from *London* to *New York*, warranted to depart with convoy from the Channel for the voyage." The ſhip was cleared for *Halifax and New York*; ſhe had proviſions on board which ſhe had a licence to carry to *New York* under a proviſo in the prohibitory act, 16 *G*. 3. But *one half of the cargo, including the goods, which were the ſubjects of this inſurance, was not licenſed*, and was not calculated for the *Halifax* market, but for *New York*. There had been a proclamation by the commander in chief to allow the entry of unlicenſed goods there, but he had no authority to iſſue it under the act. The 1ſt ſect. of the ſtat. prohibits all commerce with that province, and confiſcates all ſhips and their cargoes which ſhall be found trading, or going to, or coming from trading with them. In the 2d there is a proviſo for ſhips laden with proviſions for the uſe of his majeſty's fleets, *&c.*; but goods not licenſed found on board ſuch ſhips are declared forfeited. The ſhip was taken by an *American* privateer. *Per cur.*—The plaintiff's caſe goes on an eſtabliſhed practice againſt an act of parliament. It was illegal to ſend theſe goods to *New York*, and the plaintiff can't recover on an agreement in direct contravention to the law of the land. *Johnſton* v. *Sutton*, *Dougl*. 241.

3. If a ſhip, though neutral, be inſured on a voyage prohibited by an embargo *laid on in time of war*, by the prince of the country, in whoſe ports the ſhip happens to be, ſuch an inſurance is void. *Delmada* v. *Motteux*, *B. R. Mich*. 25 *G*. 3. *Park*, 234.

4. But *Qu*. If the embargo had been laid on in time of peace for the power of the king of *Great Britain* to lay on ſuch reſtraints then ſeems doubtful. *Ib*.

5. If a person, with full knowledge that the ship has traded, or intends to trade contrary to the revenue laws of another country makes an insurance, it is a fair contract and valid; for no country pays attention to the revenue laws of another. *Planche* v. *Fletcher*, *Dougl.* 238. *Lever* v. *Fletcher*, *Park*, 237.

6. *Quære*, How far trading with an enemy in time of actual war is legal? *Vide Park*, 237. and authorities there cited.

7. But insurances upon ships or goods of an enemy or subject on a voyage to a besieged place, with a view of carrying them assistance, or upon ammunition, provision, or warlike stores, are void; the carriage of such commodities being prohibited by the law of nations. *Park*, 243.

Of Wager Policies.

1. IN policies upon interest you recover upon the loss actually sustained, whether it be total or partial; but on a wager policy you can never recover but for a total loss.

2. An act passed 19 *G.* 2. *c.* 37. regulating insurances on ships belonging to the subjects of *Great Britain*, and on merchandizes and effects laden thereon.

3. It states the causes which gave rise to it in the preamble; "Whereas it hath been found by experience that the making assurances, interest or no interest, or without further proof of "interest than the policy, hath been productive of many pernicious practices, whereby great numbers of ships, with their "cargoes, have either been fraudulently lost and destroyed or "taken by the enemy in time of war, and such assurances have "encouraged the exportation of wool, and the carrying on many "other prohibited and clandestine trades, which by means of "such assurances have been concealed, and the parties concerned "secured from loss, as well as to the diminution of the public "revenue as to the great detriment of fair traders, and by introducing a mischievous kind of gaming or wagering under the "pretence of assuring the risk on shipping, and fair trade, the institution and laudable design of making assurances, hath been "perverted, and that which was intended for the encouragement "of trade and navigation has in many instances become hurtful "of and destructive to the same."

4. *Sect.* 1. "For remedy whereof be it enacted, that no assurance or assurances shall be made by any person or persons, "bodies corporate or politic, on any ship or ships belonging to "his majesty or any of his subjects, or on any goods, merchandizes, or effects, laden or to be laden on board of any such ship "or ships, interest or no interest, or without further proof of "interest than the policy, or by way of gaming or wagering, or "without benefit of salvage to the assurer, and that every such "assurance shall be null and void to all intents and purposes."

5. *Sect.*

5. *Sect.* 2. "Provided always, that aſſurances on private ſhips "of war, fitted out by any of his majeſty's ſubjects ſolely to "cruize againſt his majeſty's enemies may be made by or for the "owner thereof, intereſt or no intereſt, free of average, and "without benefit of ſalvage to the aſſurer, any thing herein con-"tained to the contrary thereof in anywiſe notwithſtanding."

6. *Sect.* 3. "Provided alſo, that any merchandizes or effects "from any ports or places in *Europe* or *America* in the poſſeſſion "of the crowns of *Spain* or *Portugal*, may be aſſured in ſuch way "and manner as if this act had not been made."

7. *Sect.* 5. "And be it enacted, that all and every ſum and "ſums of money to be lent on bottomry, or at *reſpondentia* upon "any ſhip or ſhips belonging to any of his majeſty's ſubjects, "bound to or from the *Eaſt Indies*, ſhall be lent only on the "ſhip, or on the merchandize or effects laden or to be laden on "board of ſuch ſhip, and ſhall be ſo expreſſed in the condi-"tion of the ſaid bond, and benefit of ſalvage ſhall be allowed to "the lender, his agents or aſſigns, who alone ſhall have a right "to make aſſurance on the money ſo lent: and no borrower of "money on bottomry, or *reſpondentia*, as aforeſaid, ſhall recover "more on any aſſurance than the value of his intereſt in the ſhip, "or in the merchandizes or effects laden on board of ſuch ſhip, "excluſive of the money ſo borrowed; and in caſe it ſhall ap-"pear that the value of his ſhare in the ſhip, or in the merchan-"dizes or effects laden on board, doth not amount to the full "ſum or ſums he hath borrowed as aforeſaid, ſuch borrower "ſhall be reſponſible to the lender for ſo much of the money "borrowed as he hath not laid out on the ſhip or merchandizes "laden thereon, with lawful intereſt for the ſame, together with "the aſſurance, and all other charges thereon, in the proportion "the money not laid out ſhall bear to the whole money lent, "notwithſtanding the ſhip and merchandize be totally loſt."

8. This regulation of inſurance on bottomry or *reſpondentia* intereſt extends only to *Eaſt-India* ſhips: and therefore an inſurance of a *reſpondentia* intereſt upon any other ſhips may be made in the ſame manner as they uſed to be before this act. *Park*, 264.

9. It has alſo been decided upon this clauſe of the act, that it never meant to make any alteration in the manner of inſurances, and it was declared by the whole court in *Glover* v. *Black* to be the eſtabliſhed law and uſage of merchants that *reſpondentia* and bottomry muſt be ſpecified in the policy of inſurance. *Park*, 264. 3 Burr. 1394.

10. Action on a policy on goods on board three *French* veſſels, all or any of them, from *St. Domingo* to *Bourdeaux*; *the policy to be deemed ſufficient proof of intereſt in caſe of loſs*. The court were of opinion that the plaintiff was entitled to recover the ſum inſured by the defendant, even if it could be proved that he had no property on board, as it was not a policy within this ſtatute; foreign ſhips not having been included on account of the difficulty of bringing witneſſes from abroad to prove the intereſt. *Theluſſon* v. *Fletcher*, *Dougl.* 301.

11. A va-

11. A valued policy is not to be conſidered as a wager policy; the only effect of the valuation is fixing the amount of the prime coſt; but for every other purpoſe it muſt be taken that the value was fixed in ſuch a manner, as the inſured meant only to have an indemnity. *Per* Lord *Mansfield*, *Lewis* v. *Rucker*, 2 *Burr.* 1167.

12. But where they are uſed merely as cover to a wager, as if a man inſured 2000*l.* and had intereſt on board to the value of a cable only, they would be conſidered as an evaſion of 19 *G.* 2. *Id. ib.*

13. Policy of inſurance on the profits expected to ariſe on a cargo of melaſſes belonging to the plaintiff, who had a contract to ſupply the army with ſpruce beer. It contained a clauſe, declaring, "that in caſe of loſs, it was agreed that the profits ſhould be valued at 1000*l.*, without any other voucher than the policy." Lord *Mansfield* thought this an inſurable intereſt, and the court of *B. R.* were of opinion that this policy could not be diſtinguiſhed from a valued one, and therefore was not within the act: for the meaning of the policy was merely to avoid the difficulty of going into an exact account of the *quantum* of the profits. *Grant* v. *Parkinſon*, *Mich.* 22 *G.* 3. *Park*, 267.

14. Inſurance upon any of the packet-boats that ſhould ſail from *Liſbon* to *Falmouth*, or ſuch other port in *England* as his majeſty ſhould direct, for one year, upon any kind of goods and merchandizes whatſoever; and it was agreed that the goods ſhould be valued at the ſum inſured on ſuch packet-boat without further proof of intereſt than the policy; and to make no return of premium for want of intereſt being on bullion or goods. The court held this policy to be an exception out of the 19 *Geo.* 2. *c.* 37. It is a mixed policy; partly a wager policy, partly an open one: and it is a valued policy and fairly, without fraud or miſrepreſentation.

15. The officers and crews of ſhips who take a prize in conjunction with his majeſty's land forces have an inſurable intereſt therein, by virtue of the prize-act which uſually paſſes at the commencement of the war. 2dly, Poſſeſſion would entitle them to inſure, upon the bare contingency of a future grant from the crown, it having conſtantly given a grant of it after condemnation ſince the time of Queen *Anne*. *Le Cras* v. *Hughes*, *B. R. Eaſt.* 22 *G.* 3. *Park*, 269.

16. Action on a ſpecial agreement, whereby the plaintiff promiſed to pay 20*l.* to the defendant at the next port a ſhip ſhould reach, provided that if ſhe did not ſave her paſſage to *China* the defendant would pay to the plaintiff 1000*l.* at the end of one month after ſhe arrived in the river *Thames*. It was made without *reference* to *any property*. But the plaintiff had ſome goods on board liable to ſuffer by the loſs of the ſeaſon. The court held this to be within 19 *G.* 2. *c.* 37., and that if it was not, that act would be entirely defeated. *Kent* v. *Bird*, *Cowp.* 583.

17. The plaintiffs had lent *Lawſon*, captain of an *Eaſt-Indiaman*, 26,000*l.*, for which he had given them a common bond in the penal

penal ſum of 52,000*l.* While he was with his ſhip at *China*, the plaintiffs got a policy of inſurance underwritten by the defendant and others in the following terms: "At and from *China* to *London*, beginning the adventure upon the goods from the loading thereof on board the ſaid ſhip at *Canton* in *China*, &c. *and upon the ſaid ſhip* from and immediately following her arrival at *Canton* in *China*, valued at 26,000*l.*, being the amount of Captain *P. Lawſon*'s common bond, payable to the parties, as ſhall be deſcribed at the back of this policy; and it bears date, *&c.*: and in caſe of loſs, *no other proof of intereſt to be required than the exhibition of the ſaid bond*: warranted free from average, and without benefit of ſalvage to the inſurer." On the head of the ſubſcription was written, "*on a bond as above expreſſed.*" The court held this to be a wagering policy, the plaintiffs having no intereſt, for if the ſhip had been loſt and the underwriters had paid, ſtill the plaintiffs would have been entitled to recover the amount of the bond from *Lawſon*. *Lowry* v. *Bourdieu*, *Dougl.* 451.

18. The reaſon of the exception in the 3d ſection of inſurances upon any merchandizes, *&c.* from any ports or places in *Europe* or *America* in the poſſeſſion of the crowns of *Spain* or *Portugal* is, that the trade from theſe countries to their colonies, and the returns thereof, can only be carried on by their own ſubjects; therefore all the goods exported from *Spain* and *Portugal* by the ſubjects of this country muſt be in the names of *Spaniſh* ſubjects. So that no other proof but the policy can be brought. *Park*, 274.

Of Re-aſſurance, and double Inſurance.

1. RE-ASSURANCE is a contract which the firſt inſurer enters into in order to relieve himſelf from thoſe riſks which he has incautiouſly undertaken, by throwing them upon other underwriters who are called re-aſſurers. *Park*, 276.

2. By 19 *G.* 2. *c.* 37. *ſ.* 4. it is enacted, "That it ſhould not "be lawful to make re-aſſurance, unleſs the aſſurer ſhould be in- "ſolvent, become a bankrupt, or die; in either of which caſes "ſuch aſſurer, his executors, adminiſtrators, or aſſigns might "make re-aſſurance, to the amount before by him aſſured, "provided it ſhould be expreſſed in the policy to be a re- "aſſurance."

3. This clauſe extends to re-aſſurance on foreign ſhips. The point came on in the form of a ſpecial caſe, ſtating that a re-aſſurance was made by the defendant *on* a *French* veſſel firſt inſured by a *French underwriter* at *Marſeilles*, who was living and ſolvent at the time of ſubſcribing the ſecond policy. The court of K. B. held the policy to be void by this ſection. *Andree* v. *Fletcher*, 2 *Term Rep.* 161.

4. An inſurance on the ſolvency of an underwriter would be conſidered as a gaming policy under 19 *G.* 2. *c.* 37. *Park*, 280.

5. A double aſſurance is when the ſame man is to receive two ſums

sums instead of one for the same loss, by reason of his having made two insurances upon the same goods or ship. *Park*, 280. cites 1 *Burr.* 496.

6. A double insurance is not void, and though the insured is not entitled to two satisfactions, yet upon the first action he may recover the whole sum insured, and may leave the defendant therein to recover a rateable satisfaction from the other insurers. *Newby* v. *Read*, Sittings at *Guildhall*, *East.* 1763. 1 *Black.* 416. *Rogers* v. *Davis*, Sittings first P. *Mich.* 17 *G.* 3. *Davis* v. *Gildart*, second P. Sittings at *Guildhall*, *East.* 17 *G.* 3. *Coram* Lord *Mansfield*.

7. Various persons may insure various interests on the same thing, and each to the whole value, (as the master for wages, the owner for freight, one person for goods, another for bottomry.) The person to whom the cargo is assigned by the indorsement of the bills of lading may insure it, as may the factor to whom the goods are consigned, if he has a balance due to him by the consignor. *Godin & al.* v. *The London Assurance Company*, 1 *Burr.* 489. 1 *Black. Rep.* 183. *Qu. vide.*

Of changing the Ship.

1. WHERE an insurance is made on a specific ship, and the insured, not being impelled by any necessity, without the consent of the underwriter, changes the ship in the course of the voyage, he has not kept his part of the contract, and cannot recover against the underwriter. *Park*, 293. *Per* Lord *Mansfield*. *Pelly* v. *The Royal Exchange Assurance Company*, 1 *Burr.* 351.

2. The plaintiff had insured interest or no interest *on any ship* he should come in from *Virginia* to *London*, beginning his adventure *on his embarking* on board such ship; the money to be paid, though his person should escape, or the ship be retaken. He embarked on the *Speedwell*, but she springing a leak at sea, he went on board the *Friendship* and arrived safe at *London*, but the *Speedwell* was taken after he left her. *Lee*, C. J. held the underwriter liable, for the insurance is on the ship the plaintiff set out in, and had that got safe home, and the other been lost, the plaintiff could not have recovered on the ground of having removed his person into the ship in the middle of the voyage. *Dick* v. *Barrell*, 2 *Str.* 1248.

Of Deviation.

1. DEVIATION is a voluntary departure without necessity or any reasonable cause, from the regular and usual course of the specific voyage insured. Whenever a deviation of this kind takes place, the voyage is determined, and the underwriters are discharged from any responsibility. *Park*, 294.

2. Where

2. Where a ſhip, bound from *Dartmouth* to *Liverpool*, put into *Loo*, a place ſhe muſt of neceſſity paſs by in the courſe of her inſured voyage; although no accident befel her there, but ſhe was loſt after ſhe got out to ſea again, yet, as ſhe had no liberty given her by the policy to go in there, *Yates* J. held it to be a deviation. *Fox* v. *Black*, *Exeter Aſſizes* 1767. *Park*, 295.

3. So where a ſhip put into a port in her way to procure a *Mediterranean* paſs, and was afterwards loſt, it was held a deviation. *Townſon* v. *Guyon*, *cor.* Lord *Mansfield*. *Park*, 295.

4. A ſhip, inſured from *Cork* to *Jamaica* with a convoy, cruized during the night, and thereby deviated out of the direct courſe of the voyage. This is a deviation. *Cock* v. *Townſend*, *C. B. cor.* Lord *Camden* C. J. *Park*, 298.

5. But a ſhip, having letters of marque, may, from the uſage, chaſe an enemy, although ſhe cannot cruize; and even if ſhe loſe ſight of the enemy for ſome hours, it will be no deviation. *Jolly* v. *Walker*, *cor.* Lord *Mansfield*, *Eaſt.* 1781, *at Guildhall*. *Park*, 299.

6. The ſhip *Eyles* being at *Bengal* in 1732, the owner inſured her for 500*l.* the adventure thereon to commence from her arrival at *Fort St. George*, and thence to continue till the ſhip ſhould arrive at *London*. The *Eyles* came to *Fort St. George*, *February* 1733, in her way to *England*, but being leaky and in a very bad condition, on the unanimous advice of the governor, council, commanders of ſhips, *&c.* ſhe ſailed to *Bengal* to be refitted; and being ſheathed, in her return upon her homeward bound voyage, ſhe ſtruck upon the *Engilee* ſands and was loſt. When this cauſe came on before Lord Chancellor *Hardwicke* he refuſed to decide it; but he obſerved that if the ſhip was in a decayed condition, and went to the neareſt place to be refitted, he ſhould conſider it equally the ſame as if ſhe had been repaired at the very place from whence the voyage was to commence according to the terms of the policy, and no deviation. His lordſhip directed an iſſue to try whether the loſs was a loſs during the voyage, and according to the adventure which was agreed upon and intended to be inſured; and on the trial at *Guildhall* in *C. B.* there was a verdict for the plaintiff. *Motteux et al.* v. *The London Aſſurance Company*, 1 *Atk.* 345. *Guibert* v. *Readſhaw*, *Sittings in London*, *Hil.* 1781. *cor.* Lord *Mansfield*, S. P. *Park*, 301.

7. If the ſhip be driven out of her direct courſe by ſtreſs of weather, it is no deviation. *Harrington* v. *Halkeld*, *cor.* Lord *Mansfield*, 1778. *Park*, 302.

8. When a ſhip was driven by ſtorm from *St. Kitt's* (being her port of loading) into *St. Euſtatius*, which was in her road to *London*, to which place ſhe was inſured, and after having done all ſhe could to get up from thence to *St. Kitt's* ſhe was ſold to a perſon there, when, not having finiſhed her loading at *St. Kitt's*, ſhe took in the reſt of her cago there, and was afterwards loſt in her voyage to *London*: this was held to be no deviation, and the inſurer liable. *Delaney* v. *Stoddart*, 1 *Term Rep.* 22.

9. On

9. On an insurance from *London* to *Gibraltar*, warranted to depart with convoy. It appeared that there was a convoy appointed for that trade at *Spithead*, and the ship, having tried for convoy in the *Downs*, proceeded to *Spithead*, and was taken in her way thither. *Lee* C. J. held the ship to be under the defendant's insurance to a place of general rendezvous. *Gordon* v. *Morley*, *Campbell* v. *Bourdieu*, 2 *Stra.* 1265. *Bond* v. *Nutt*. *Per* Lord *Mansfield*.—Although the usual place of rendezvous be out of the direct course of the voyage. *Cowp.* 601. *Enderby et al.* v. *Fletcher*, *Sittings in London*, *cor.* Lord *Mansfield*. *Trin.* 1780. *Park*, 309.

10. If it be customary for ships to stop at certain places lying out of the direct course of the voyage, it is no deviation; but it must be the *settled and direct usage of the voyage and trade*. *Salisbury* v. *Townson*, *Park*, 309.

11. Where there is a deviation through necessity, it is incumbent on the insured to pursue that voyage of necessity *directly in the shortest and most expeditious manner*, and if the ship in her way stops at different places and trades there, these are deviations, and not within the protection which the supposed necessity affords to the direct voyage. *Lavabre* v. *Walter*, *Dougl.* 271.

12. Insurance from *Carolina* to *Lisbon*, and from thence to *Bristol*. It appeared that the captain had taken in salt, which he was to deliver at *Falmouth* before he went to *Bristol*; but the ship was taken in the direct road to both, before she came to the dividing point where she would have turned off to *Falmouth*. *Lee* C. J. held the insurer liable, for it is but an intention to deviate. *Foster* v. *Wilmer*, 2 *Stra.* 1249. *Carter* v. *Royal Exchange Assurance Company*. S. P. *Ibid.* S. P. *Per Lord Mansfield in Thelusson* v. *Ferguson*, *Dougl.* 346.

13. The ship *Molly* being insured "at and from *Maryland* to *Cadiz*," was taken in *Chesapeak Bay*, in the way to *Europe*. In an action on the policy against the underwriters, it appeared that the ship was cleared from *Maryland* to *Falmouth*, and a bond given, that all the *enumerated* goods should be landed in *Britain*, and all the rest in the *British* dominions. An affidavit of the owner stated that the vessel was bound for *Falmouth*. The bills of lading were "to *Falmouth* and a market," and there was no direct evidence whatever that she was destined for *Cadiz*. The place where she was taken was in the course both to *Cadiz* and *Falmouth*. Lord *Mansfield* told the jury, that if they thought the voyage intended was to *Cadiz* they must find for the plaintiff; but if they should think *there was no design of going to Cadiz*, they should find for the defendant. And on a motion for a new trial, the court were of opinion on the evidence that the voyage never was designed for *Cadiz*, and discharged the rule. *Wooldridge* v. *Boydell*, *Dougl.* 16.

14. If a ship be insured from a day certain, from *A.* to *B.*, and before the day sail on a different voyage from that insured, the assured cannot recover, though the ship afterwards sail into

the

the course of the voyage insured, and be lost after the day on which the policy was to have attached. *Way* v. *Modigliani*, 2 *Term Rep.* 30.

See Kewley v. Ryan, 2 H Black. 353.

15. Deviation or not is a question of fact, to be decided according to the circumstances of the case. *Dougl.* 758.

Of Non-compliance with Warranties.

1. A Warranty on a policy of insurance is a condition or contingency, that a certain thing shall be done or happen; and unless that is strictly performed, whether it be material or otherwise, there is no valid contract. *Park*, 318.

2. Action on a policy of insurance on goods, dated 9th *Dec.* 1784, *lost or not lost, warranted well this 9th day of Dec.* 1784. The policy was underwritten between the hours of one and three in the afternoon of the 9th of *Dec.* It appeared that the ship was well at six o'clock in the morning, but was lost at eight o'clock the same morning. Upon motion to set aside a nonsuit the court of K. B. were of opinion that the warranty was sufficiently complied with, if the ship were well at any time of the day. For though the thing warranted must be literally complied with, yet if it be so, that is enough; that there was good reason for inserting these words, because they protected the underwriter from losses before that day to which he would otherwise have been liable, as the policy was on the goods from the lading: *and thus too the words "lost or not lost" have also their operation.* *Blackhurst* v. *Cockell*, 3 *Term Rep.* 360.

3. Though a written paper be wrapped up in the policy when it is brought to the underwriters to subscribe, and shewn to them at the time; or even though it be wafered to the policy at the time of subscribing, it is not a warranty, but only a representation. *Per* Lord *Mansfield*. *Pawson* v. *Watson*, *Cowp.* 798. *Pawson* v. *Barnevelt*, *Dougl.* 12. *n.* *Bize* v. *Fletcher*, *Ib.*

4. Plaintiff insured the ship *Martha*, at and from *London* to *New York*, the voyage to commence from a day specified, and in the margin of the policy was written these words "eight nine-pounders with close quarters; six six-pounders on her upper decks; thirty seamen besides passengers." *Per* Lord *Mansfield*— There is no doubt but this is a warranty. Its being written on the margin makes no difference. *Bean* v. *Stupart*, *Dougl.* 10. *Kenyon* v. *Berthon*, S. P. *Dougl. p.* 12. *n.* 4. *De Hahn* v. *Hartley*, S. P. *Resolved* 1 *Term Rep.* 343.

5. In an action on a policy, the declaration stated that a policy was made on the ship *New Westmorland*, at and from *Jamaica* to *London*, *warranted to sail on or before the* 26*th of July* 1776, free from capture, and free from all restraints and detainments of kings, princes, and people, of what nation, condition, or quality soever. That the ship was preparing and ready to set sail, and would have sailed on the 25th of *July* on her intended voyage, *if she*

She had not been detained by Sir B. K. the then governor of *Jamaica, and detained beyond the day;* that ſhe then ſailed and was captured. On motion to ſet aſide a verdict for the plaintiff, the court were of opinion that the warranty was *poſitive and expreſs* that the ſhip ſhould depart on or before the day appointed, and therefore muſt be complied with, and made the rule to ſet aſide the verdict and enter a nonſuit abſolute. *Here* v. *Whitmore, Cowp.* 784.

6. On the 8th of *December* 1777, a policy was underwritten by the defendant on goods in a *French* ſhip "at and from *Martinico* to *Havre de Grace*, with liberty to touch at *Guadaloupe; warranted to ſail after the 12th of* January, *and on or before the 1ſt of* Auguſt 1778." At the time of the inſurance it was not known whether the ſhip would load at *Martinico* or *Guadaloupe*, the inſurers having goods to come from both places, the policy was therefore intended to cover the riſk from both or either of them. The ſhip having finiſhed her outward-bound voyage at *Martinico*, ſailed from thence on the 6th of *November* 1777, for *Guadaloupe*, where ſhe took in her whole lading without returning to *Martinico*, which the captain intended to do, had he not got a complete cargo at *Guadaloupe*, from whence the ſhip ſailed on 26th of *June* 1778, and was taken on the 3d of *September*. On an action againſt the underwriters it was objected for the defendants, that by the words of the policy the voyage was to commence at *Martinico*, and not from *Guadaloupe*, and that the warranty of the time of ſailing was not complied with; the ſhip *having ſailed from* Martinico *before the 12th of* January 1778, *viz.* 6th *November* 1777, and the jury, under the direction of *Buller* J. found for the defendants. *Vezian* v. *Grant, Park*, 326.

7. Action on a policy on the ſhip *Capel*, loſt or not loſt, *at and from* Jamaica *to* London; *warranted to have ſailed on or before the 1ſt of* Auguſt 1776. The policy was effected on the 20th of *Auguſt*. The ſhip was completely laden for her voyage to *England* at *St. Anne's* in *Jamaica; and ſailed from* St. Anne's *bay on the 26th of* July *for* Bluefields, *in order to join convoy there*, that being the general rendezvous for convoy on the *Jamaica* ſtation, and where a convoy then lay, which was expected to ſail for *England* every day; but the greater part of the way from *St. Anne's* to *Bluefields* is out of the direct courſe of the voyage from *St. Anne's* to *England*. She arrived off *Bluefields* on the 28th or 29th of *July*, where ſhe was immediately ſtopped by an embargo laid on all veſſels being in any port of *Jamaica*, and was detained there 'till the 6th of *Auguſt*, when ſhe ſailed with the convoy for *England*, but afterwards, being ſeparated in the paſſage, was taken by an *American* privateer. A verdict being found for defendant, the court of *B. R.*, after two arguments, were of opinion that the voyage from *Jamaica* to *England*, *began from* St. Anne's; the ſhip having ſailed with no other object or view but to make the beſt of her way to *England* by the ſafeſt courſe, and granted a new trial. *Bond* v. *Nutt, Cowp.* 601. *Theluſſon* v. *Ferguſon*, S.P. *Dougl.* 346. *Theluſſon* v. *Staples, Park*, 336.

8. An embargo was actually publiſhed before the ſhip ſailed, and the captain immediately after croſſing the bar, returned to make a proteſt, and ſent his ſhip knowingly into the embargo; but he ſwore that he expected the embargo was to be taken off, and that he ſhould proceed immediately upon his voyage, and the jury believing him, the inſurer had a verdict. *Earle* v. *Harris*, cited by Lord *Mansfield* in *Theluſſon* v. *Staples*, *Ib.*

9. Rule to ſhew cauſe why a verdict obtained by the defendant ſhould not be ſet aſide and a new trial had. It was an action on a policy on the ſhip *Arundel*, Captain *Mann*, at and from *Jamaica* to *London*, *warranted to depart with convoy*. On 25th *July* the *Arundel* ſailed from *Morant* harbour to *Kingſton*, where ſhe met the *Glorieux* man of war, Captain *C.* who was likewiſe on his way to join Admiral *Graves* at *Blueſields*, where the commander in chief had appointed him to rendezvous in order to take the fleet of merchant ſhips, which were to ſail from thence upon the 1ſt of *Auguſt*, under his command, and to convoy them to *Great Britain*. On their meeting in *Kingſton* harbour Captain *Mann* applied to Captain *C.* for ſailing orders, *who ſaid he had none, not having himſelf at that time joined the admiral*. They proceeded together to *Blueſields*; but the admiral had ſailed two days before. The *Glorieux* and *Arundel* then ſailed from *Blueſields*, the former firing guns, giving ſignals, and behaving in every reſpect *like a convoy*, as the captain had promiſed to do before they ſailed. They afterwards joined the fleet on the 7th *Auguſt*, and the *Arundel* was afterwards loſt in a ſtorm. The court, *Willes* J. *diſſentiente*, were of opinion that the warranty in the policy was not complied with, and diſcharged the rule. *For ſhips muſt ſail under the convoy appointed by the government of the country, who proportion the ſtrength of it to the neceſſity of the times.* That it was a queſtion of fact, whether the *Glorieux* was a part of the convoy or not, and it appeared from the evidence that ſhe was not, for to make her ſo it muſt appear that ſhe was under the orders of the admiral. *Hibbert* v. *Pigou*, *Eaſt.* 23 *G.* 3. *Park*, 339.

10. The warranty "to *depart* with convoy," or "to *ſail* with convoy," means to depart with a convoy intended for the *whole* voyage. But when a convoy for the whole voyage is clearly intended, an unforeſeen ſeparation is an accident to which the underwriter is liable. *Lilly* v. *Ewer*, *Dougl.* 72. Vid. Jeffries v. Legendre, 16 Vin. 407. Carth. 216. 4 Mod. 58. S. P.

10. A ſhip warranted *to depart with convoy* waited for it two months, and then ſailed out of the harbour to join it, purſuant to a ſignal made by the admiral of the convoy as he paſſed the harbour, a yawl being alſo ſent in to order the ſhips which were there out. She joined the fleet, but could not get to a man of war for ſailing orders, owing to tempeſtuous weather, and was afterwards captured. *Lee* C. J. held, that as the captain had done every thing in his power to receive ſailing orders, it was a departing with convoy. *Victoria* v. *Cleave*, 2 *Stra.* 1250.

12. Action on a policy, there being a warranty to depart with convoy. It appeared in evidence that the commodore of the convoy had made signals for sailing the night before, and made repeated ones the next morning from 7 till 12, notwithstanding which the ship insured did not sail till two hours after him, in consequence of which she was taken by a privateer. The plaintiff was nonsuited. *Taylor* v. *Woodness*, *cor.* Lord *Mansfield*, *at Guildhall*, *Hil.* 4 *G.* 3. *Park*, 349.

13. Plaintiffs insured the *Yonge Herman Hiddinga*, and her cargo, at and from *L'Orient* to *Rotterdam*, "*warranted a neutral ship and neutral property.*" The ship being captured during her voyage by some *English* men of war, in an action against the underwriters on the policy, the declaration stated, that the defendants subscribed the policy on 28th *November* 1780, and that the ship and cargo were at that time neutral property. It appeared in evidence, that the ship and cargo were neutral property at the time of the ship's departure from *L'Orient*, and so continued until the 20th of *December* 1780, when hostilities commencing between the *English* and *Dutch*, the ship and cargo ceased to be neutral property, and were taken on the 25th of *December* 1780. The court of *B. R.* were of opinion, that the insured only warranted the property neutral at the time of her departure, and not that they were to continue so during the whole voyage, and the *postea* was delivered to the plaintiffs. *Eden & al.* v. *Parkinson*, *Dougl.* 705.

Saloucci v. Johnson, Per Buller J. S. P. Park, 364. Tyson et al. v. Gurney, B. R. 30 G. 3. Ib. 353. S. P. Adm.

14. In an action on a policy of insurance upon the *Joanna*, "warranted neutral ship and neutral property." A condemnation of a foreign court of admiralty is not conclusive evidence that the ship was not neutral, unless it appear that the condemnation went upon that ground. *Bernardi* v. *Motteux*, *Dougl.* 554.

15. But if it appear evident without any ambiguity, that the sentence of a foreign court of admiralty proceeded upon the ground of the property not being neutral, that is conclusive evidence against the insured that he has not complied with the warranty, and the underwriter is no longer responsible. *Barzillay* v. *Lewis*, *B. R. Trin.* 22 *G.* 3. *Park*, 359. *De Souza* v. *Ewer*, *Guildhall*, *Hil.* 1782. *cor.* Lord *Kenyon*, S. P.

16. Action against the underwriters on a policy of insurance on goods warranted neutral. The sentence of the *Spanish* court of admiralty, condemning the ship and cargo as good and lawful prize, and not stating the special ground of the sentence, was held to be conclusive evidence of the falsehood of the plaintiff's warranty. *Saloucci* v. *Woodmass*, *B. R. Hil.* 24 *G.* 3. *Park*, 362.

17. If the ground of the decision appear to be not on want of neutrality, but upon a foreign ordinance manifestly unjust and contrary to the law of nations, and the insured has only infringed such law; as the condemnation did not proceed on the point of neutrality,

neutrality, it cannot apply to the warranty ſo as to diſcharge the inſurer. *Mayne* v. *Walter*, *B. R. Eaſt.* 22 *G.* 3. *Park*, 363.

18. Action upon a policy upon a *Tuſcan* ſhip, warranted neutral. Upon a caſe ſtated for the opinion of the court of *B. R.* it appeared that the plaintiffs were *Tuſcan* ſubjects reſident at *Leghorn*; that the ſhip, having neutral goods on board conſigned to *London*, was captured by a *Spaniſh* veſſel, carried into *Spain*, and there condemned as prize; that the grounds of the condemnation were—1ſt, That the ſhip refuſed to be ſearched, and reſiſted with force, having fired at the *Spaniard*. 2d. That ſhe had no charter-party on board. The captain anſwers them thus. 1ſt. That he reſiſted and fired, the *Spaniard* having hailed him under falſe colours. 2d. That he had taken the goods on board by the piece, in which caſe a manifeſto without a charter-party is ſufficient. The ſentence admits the ſhip to be neutral, for it ſtates it to be "the ſhip *Thetis*, a *Tuſcan* ſhip." The ſecond ground was given up as not being a cauſe of ſeizure, and the court were of opinion that a neutral ſhip need not ſtop to be ſearched, but the ſtoppage is at the peril of the party, and a refuſal is no breach of neutrality to affect the owners. *Saloucci* v. *Johnſon*, *Hil.* 25 *G.* 3. *Park*, 364.

Of Return of Premium.

1. IN all countries in which inſurances have been known, it has been a cuſtom, coeval with the contract itſelf, that where property has been inſured to a larger amount than the real value, the inſurer ſhall return the overplus *premium*: or if it happen that goods are inſured to come in a certain ſhip from abroad, but are not in fact ſhipped, the premium ſhall be returned. If the ſhip be arrived before the policy is made, and the underwriter is acquainted with the arrival, but the inſured is not, it ſhould ſeem the latter will be entitled to have his premium reſtored on the ground of fraud. *Park*, 367.

2. But if both parties be ignorant of the arrival, and the policy be (as it uſually is) *loſt or not loſt*, I think in that caſe the underwriter ſhould retain; becauſe under ſuch a policy, if the ſhip had been loſt at the time of ſubſcribing, he would have been liable to pay the amount of his ſubſcription. *Ib.*

3. Action againſt an underwriter for a return of *premium*. The material part of the policy was "At and from any port or ports in *Grenada* to *London*, or any ſhip or ſhips that ſhall ſail on or between the 1ſt of *May* and the 1ſt of *Auguſt* 1778, at 18 guineas *per cent.*, to return 8*l. per cent. if ſhe ſails from any of the* Weſt India *iſlands with convoy for the voyage and arrives.*" At the bottom was a written declaration, that the policy was on ſugars (the *Muſcovado*, valued at 20*l. per* hogſhead), for the account of *L. Q.*, being the firſt ſugars which ſhall be ſhipped for that account. The ſhip ſailed with convoy within the time limited, having on board 51 hogſheads of ſugar belonging to *L. Q.*, and arrived ſafe in the

Downs, where convoy left her, they never coming further. Afterwards she struck on the *Pan-sand* at *Margate*, 11 of the 51 casks of sugar were washed overboard and the rest damaged. She was afterwards got off and arrived safe in *London*. The sugars saved were taken out at *Margate*, and when sold produced but 341*l.* instead of 800*l.*, at which they were valued. The defendant had paid into court the value of the sugars lost, and a return of 8*l. per cent.* on 341*l.* The plaintiffs insisted that they were entitled to have 8*l. per cent.* also returned on the *valued* price of the 11 hogsheads of sugar which were lost, and on the difference between what the remaining 40 hogsheads produced and their valued price. A verdict being found for the plaintiff, on a motion for a new trial, the court were of opinion that the words "*and arrives*" did not mean that the ship should arrive in the company of convoy, but only that she herself shall arrive; and as to the return of the additional premium, whether the goods arrive safe or not, makes no part of that question. That which gave rise to an increase of premium was the danger of capture, and when that is diminished there should be a proportional return of premium; and the rule was discharged. *Simonel et al.* v. *Boydell*, *Dougl.* 255.

4. In *England* it has always been the custom, when the policy is cancelled, to return the premium, deducting one half *per cent.* *Molloy, lib.* 2. *c.* 7. *f.* 12. *Park*, 372.

5. An insurance being made without interest, and the premium paid, the insured shall not recover back the premium after the ship has arrived safe. The court seemed in this case to go on the ground of the contract being *executed*, the risk being over. But they seemed to think that if the action had been brought while the contract was executory it would have been otherwise. *Lowry* v. *Bourdieu*, *Dougl.* 451. *Andree* v. *Fletcher*, 3 *Term Rep.* 266.

Per Buller J. makes no difference whether the premium was paid before the voyage or after it. Ib.

As to the difference where the relief is applied for when the contract is *executory* and when it is *executed*, vid. Wharton v. De-La-Rive, Park, 376.

6. Insurance on a ship at five guineas *per cent.*, lost or not lost, *at and from* London *to* Halifax *in* Nova Scotia, warranted to *depart with convoy from* Portsmouth, for the voyage, that is to say the *Halifax* or *Louisbourgh* convoy. Before the ship arrived at *Portsmouth* the convoy was gone. Notice of this was immediately given to the underwriter, and he was desired either to make the long insurance or to return part of the premium. In an action for the amount of it, as money had and received to plaintiff's use, the jury find that the usual settled premium from *London* to *Portsmouth* is one and an half *per cent.*, and that it is usual for the underwriter in like cases to return part of the premium; but the *quantum* is uncertain as it depends upon uncertain circumstances. The court of *B. R.* were of opinion that upon the policy there were two distinct points of time, in effect two voyages, one from *London* to *Portsmouth*, and the other from thence to *Halifax*, which were clearly in the contemplation of the parties, and only one of them

them made. It was a conditional contract, and the second voyage was not begun, therefore the premium for it must be returned, for the risk never took place at all upon it. *Stevenson* v. *Snow*, 3 *Burr.* 1237. 1 *Black. Rep.* 318. S. C.

7. But where the policy was, "at and from *London* to any other port or place whatsoever for 12 *months*, at 9*l. per cent.*, warranted free from capture by the *Americans*;" and the ship was taken in two months by an *American* privateer: The court thought the risk entire, and being once begun, that there should be no return of premium. *Tyrie* v. *Fletcher*, *Cowp.* 666.

8. So where the insurance was "for 12 months, at and after the rate of 15*s. per* month," it was held that there should be no apportionment, nor return of premium. *Loraine* v. *Tomlinson*, *Dougl.* 564.

9. Insurance on a ship and goods "*At and from* Honfleur, *to the coast of* Angola, *during her stay and trade there. At and from thence to her port or ports of discharge in* St. Domingo *back to* Honfleur." On the voyage from *Angola* to *St. Domingo* there was a wilful deviation. The court of King's Bench held this contract to be entire, and the risk having been commenced, that the insured was not entitled to a return of premium for the voyage from *St. Domingo* back to *Honfleur*. *Bermon* v. *Woodbridge*, *Dougl.* 751. *Meyer* v. *Gregson*, *B. R. East.* 24 *G.* 3. S. P. *Park*, 389.

10. Action for the return of premium. The policy was "at and from *Jamaica* to *London*, warranted to depart with convoy for the voyage, and to sail on or before the 1st of *August*." The ship sailed on the 31st of *July*, but without convoy. The jury found in addition "that the constant usage in an insurance at and from *Jamaica* to *London*, warranted to depart with convoy, or to sail on or before the 1st of *August*, when the ship does not depart with convoy, or sails after the 1st of *August*, is to return the premium, deducting one half *per cent.*" On a case reserved, the court of *B. R.* were of opinion, that an express usage being found, it cured the difficulty arising from an apportionment, and the *postea* was delivered to the plaintiff. *Long* v. *Allen*, *B. R. East.* 25 *G.* 3. *Park*, 390.

Of Insurances upon Lives.

1. BY 14 *G.* 3. *c.* 48. *s.* 1. it was enacted, "That no insurance should be made by any person or persons, bodies politic or corporate, *on the life or lives* of any person or persons, or any other event or events whatsoever, wherein the person or persons, for whose use, benefit, or on whose account such policies should be made, *should have no interest, or by way of gaming or wagering*; and every insurance made contrary to the true intent and meaning thereof, should be null and void to all intents and purposes."

2. By *sect.* 2. It was further enacted, "That it should not be lawful to make any policy or policies on the life or lives of any

perſon or perſons, or other event or events, without inſerting in ſuch policy or policies the perſon's name intereſted therein, and for whoſe uſe, benefit, or on whoſe account ſuch policy was ſo made and underwrote."

3. By *ſect.* 3. "That, in all caſes where the inſured had an intereſt in ſuch life or lives, event or events, no greater ſum ſhould be recovered or received from the inſurer or inſurers than the amount or value of the intereſt of the inſured in ſuch life or lives, or other event or events."

4. Action on a policy of inſurance on the life of *James Ruſſel*, from the 1ſt of *June* 1784 to the 1ſt of *June* 1785. By a memorandum at the foot of the policy, it was declared that it was intended to cover the ſum of 5000*l.* due from *Ruſſel* to the plaintiff, for which he had given his note. Two objections were made for the defendant. 1ſt. That part of the conſideration for the note was money won at play. 2d. That *Ruſſel*, at the time he gave the note, was an infant. Mr. Juſtice *Buller* nonſuited the plaintiff on the 1ſt ground, for as part of the conſideration of the note was for a gaming tranſaction, there was a want of intereſt in the plaintiff. On the 2d, He ſaid that he took the intereſt to be contingent, for *Ruſſel* might or might not avoid the note, and he doubted much whether, till ſo avoided, the note muſt not be taken againſt a third perſon to be the note of an adult. *Dwyer* v. *Edie*, *London Sittings after Hil.* 1788. *Park*, 432.

5. When an inſurance is made upon a man's life who goes to ſea, and the ſhip in which he ſails is never afterwards heard of; the queſtion, whether he did or did not die within the term inſured, is a fact to be aſcertained by the jury from the circumſtances produced in evidence. *Et per* Lord *Mansfield*, if the caſe be ſo doubtful that the jury cannot form an opinion, the defendant ought to have the verdict. *Patterſon* v. *Black*, *Guildhall*, *Hil.* 1782. *Ib.* 433.

6. Action on a policy on the life of Sir *James Roſs*, for one year, from *October* 1769 to *October* 1770, *warranted in good health at the time of making the policy.* Sir *James* had received a wound which had occaſioned a palſy, ſo that he could not retain his urine or *fæces*, which was not mentioned to the inſurer; but he died of a malignant fever within the time, with which it was proved that this wound had no connection. *Per* Lord *Mansfield.* When an inſurance is upon a warranty, it muſt be proved, *that the life was in fact a good one, and ſo it may be though he have a particular infirmity.* And the jury found a verdict for the plaintiff, under his lordſhip's direction. *Roſs* v. *Bradſhaw*, 1 *Black.* 312.

7. A man, troubled with ſpaſms and cramps from violent fits of the gout, is a life capable of being inſured, if he has no ſickneſs at the time to make it an unequal contract. *Willis* v. *Poole*, *Guildhall*, *Eaſt.* 1780. *cor.* Lord *Mansfield* C. J.

8. In this ſpecies of contract the riſk is entire, and if it be once begun there ſhall be no return of premium, though it ſhould ceaſe the very next day after it commenced. *Per* Lord *Mansfield.*

field. In *Tyrie* v. *Fletcher*, *Cowp.* 699. and *Bermon* v. *Woodbridge*, *Dougl.* 758.

Of Insurance against Fire.

1. ACTION of covenant upon a policy of insurance from fire, in which there was a proviso, that the defendants *should not be liable in case the same should be burnt by any invasion by foreign enemies, or any military or usurped power whatsoever.* The defendants plead, 1st, The general issue, and 2dly, that the premises were burnt *by an usurped power.* Issue being joined thereon, it appeared on the trial, that on the 27th *November* a mob arose at *Norwich*, on account of the high price of provisions, and destroyed quantities of flour, but on reading the proclamation dispersed; that afterwards another mob arose, and burnt the malting office mentioned in the policy. A verdict being found for the plaintiff, subject to the opinion of the court of *C. B.* three judges, *Gould* J. *dissentiente*, were of opinion that this was not a burning within the proviso. *Drinkwater* v. *The Corporation of the London Assurance*, 2 *Wilf.* 363.

2. Where the words in the policy declare that the insurers will not pay any damage by fire which happens by *civil commotion*, they are not answerable for damages by fire occasioned by an insurrection of the people for the purposes of general mischief, though not amounting to a rebellion. As where the mob in 1780 rose in the city of *London*, and burnt and destroyed Roman Catholic chapels, public prisons, and the houses of various individuals. *Langdale* v. *Mason et al. Guildhall, Mich.* 1780. *cor.* Lord *Mansfield* C. J.

3. Policies of insurance against fire are not in their nature assignable, and the interest in them cannot be transferred from one person to another without the express consent of the persons who make the insurance. *Lynch et al.* v. *Dalzell et al.* 3 *Brown's Parl. Cas.* 497. *The Sadlers' Comp.* v. *Badcock et al.* S. P. 2 *Atk.* 554.

4. But by the proposals of the different offices, when any person dies the policy and interest therein shall continue to the heir, executor, or administrator respectively to whom the property insured shall belong; provided, before any new payment be made, they do procure their right to be indorsed on the policy at the office, or the premium to be paid in the name of the said heir, *&c. Park*, 449.

Poor.

16Vin. 414. (C) Orders as to Children of Parents being rated.

THE defendant was indicted for refuſing to obey an order of ſeſſions for maintaining his two infant grand-children. It was moved in arreſt of judgment that this is a new offence, created by 43 *Eliz. c.* 2. *ſ.* 7. for which a particular penalty and a ſpecific method of recovering it is given, and that therefore the party cannot be puniſhed by indictment. *Sed per* Lord *Mansfield* —In the preſent caſe a remedy exiſted before the ſtatute, for diſobedience to an order of ſeſſions is an offence indictable at common law, ſo that there are two remedies, of which the preſent is one. *Rex* v. *Robinſon*, 2 *Burr.* 799.

16Vin. 424. (D) Poor Rates. By whom made, and how.

1. IF the overſeers refuſe to make a rate, the court of K. B. will grant a *mandamus* to compel them; but not to make an equal rate, for it is to be preſumed the overſeers will do juſtice; and if not, the proper remedy is by appeal to the ſeſſions. *Rex* v. *Barnſtaple*, 1 *Barnard.* 137.

2. So the court refuſed to grant a *mandamus*, directing them to inſert particular perſons in the rate upon affidavits of their being left out to prevent their having votes for parliament men. *Rex* v. *The Churchwardens of Weobly*, 2 *Stra.* 1259.

3. A motion for a *mandamus* was made to direct the juſtices of *Canterbury* to rate perſonal property, but the rule was diſcharged on ſhewing cauſe. *Rex* v. *Juſtices of Canterbury*, 1 *Bott* by *Conſt*, 112. *pl.* 154.

4. A motion was made for a *mandamus* to the officers of *St. George's Middleſex*, to make a monthly rate, the rates now being made quarterly. Lord *Mansfield* ſaid, it ſeemed full as well to make a rate for three as for one month, and diſcharged the rule. *E.* 10 *G.* 3. 2 *Bl. Rep.* 694.

5. The ſeſſions have no original power to order an aſſeſſment to be made, but only if it come before them by way of appeal, and a rate was quaſhed on this gound without defence. *Rex* v. *Aberford, Eaſt.* 2 *Lord Raym.* 798.

Of allowing the Rate.

1. A *Mandamus* iſſued to the juſtices to ſign a poor rate made by the churchwardens and overſeers. Before the return a motion was made to ſuperſede it on ſeveral objections to its fairneſs, and that this would be ſpeedier and better for the poor than to reſerve the debate of them for a formal return. *Sed per cur.*—The two juſtices are neceſſary to ſign the rate only by way of form, for it is the churchwardens and overſeers who are to make it. Whether it be a fair rate is a queſtion intended for the juriſdiction of the ſeſſions, and not for our examination; and on the juſtices returning, that they could not allow the rate as not being proper, the court quaſhed the return, and ordered an attachment. *Rex* v. *The Juſtices* of *Dorcheſter*, *Stra.* 393. *Rex* v. *Uttoxeter*, *Eaſt.* 5 *G.* 1. S. P. 3 *Dougl. on Elect.* 142. *in notes.*

2. So where juſtices kept out of the way to avoid being ſerved with a *mandamus* to ſign a poor rate, the court granted an attachment for the contempt. *Rex* v. *Edwards and Symonds*, *Black. Rep.* 631.

3. *Mandamus* to the juſtices of *Wotton Baſſet* to allow a rate, return, that ever ſince 43 *Eliz. c.* 2. the juſtices have appointed four, three, or two overſeers within the borough, and that they have always made rates within their juriſdiction, and that the rate offered to them was made by overſeers appointed by the juſtices of the county, and not of the borough. *Per cur.*—The return muſt be confirmed. *Rex* v. *Folly*, *Trin.* 27 & 28 *G.* 2. 4 *Bott* by *Conſt*, 62. *pl.* 89.

(E) Poor Rates. Liable what. Perſonal Property. 16 Vin. 425.

1. IN the *King* and *Witney*, Lord *Mansfield* doubted of the opinion that a tradeſman is taxable for his ſtock in trade, as is reported in *Reg.* v. *Barking*, *Ld. Raym.* 1280. 16 *Vin. Abr.* 426. *pl.* 7. and ſaid that the queſtion there was not before the court. 5 *Burr.* 2634 See alſo *Rex* v. *Juſtices of Canterbury*, 1 *Bott* by *Conſt*, 112. *pl.* 154.

2. A poors' rate was made, which on appeal the ſeſſions quaſhed, ſtating, as the ground in their order, that it appeared to them that *A. B.* and *C.* were poſſeſſed as co-partners of ſtock in trade, and buſineſs of common brewers and maltſters in the pariſh of *R.* to the value of 4000*l.* for no part of which had the co-partners been aſſeſſed in the rate, and that it don't appear that ſtock in trade had ever before been rated in that pariſh. The court inclined to think the property not rateable, but quaſhed the order of ſeſſions, on the ground that the juſtices had quaſhed inſtead of amending the rate. *Rex* v. *Ringwood*, *Cowp.* 326.

3. It

3. It is a very different queſtion, whether perſonal property is to be rated to the utmoſt extent, or not at all. It would make the poor laws very oppreſſive if every man who has money in the funds ſhould be liable, lawyers for their fees, ſoldiers for their pay, and the like. But where men are occupiers of houſes and have a ſtock in trade, whether that may be taken into conſideration is a different queſtion; ſome perſonal eſtate may be rateable, *but it muſt be local and viſible property, within the pariſh.* It would be material to ſtate what has been the cuſtom of rating; if the uſage has been to take in ſtock in trade, there would be very good right to ſupport it. *Per* Lord *Manſfield. Rex* v. *Churchwardens of Andover, Cowp.* 550.

4. On ſhewing cauſe againſt a rule for quaſhing an order of ſeſſions confirming a poor rate, it appeared that the appellant was a clothier, and was rated in reſpect of his ſtock in the cloathing trade which he had in the pariſh. Lord *Manſfield* aſked what uſage had heretofore been in this place with reſpect to rating ſtock in trade; and being told that it was waived by agreement, he ſaid it could not be, and that the caſe muſt be ſent back to the ſeſſions to ſtate the uſage, when it appearing to be the cuſtom there to rate perſons for their ſtock in trade, the court ordered the rate to ſtand. *Rex* v. *Hill, Cowp.* 613.

5. So where a butcher was rated for his ſtock in trade in a pariſh where the uninterrupted uſage ſince 43 of *Eliz.* had been to rate it, the rate was affirmed. *Rex* v. *Jane Rodd, Cald.* 147.

6. An officer is not rateable to the relief of the poor for his ſalary as ſuperintendant of ſalt works in the pariſh. *Rex* v. *Shallfleet*, 1 *Bott* by *Conſt*, 109. *pl.* 152. 4 *Burr.* 2011.

7. Ships are rateable in that pariſh where the port is from whence they trade. *Rex* v. *S. White and others*, 4 *Term Rep.* 771. *Nol. Rep.* 112.

8. The intereſt of money is not rateable. *Ib.* Neither is principal money unemployed. *Per Buller* J. and *Groſe* J. Lord *Kenyon* Ch. J. *heſitante, Aſhhurſt* J. *abſente. Ib.*

9. Neither is the ſalary of the collector of the cuſtoms, or the half-pay of a captain of the navy, or the pay of the maſter of a trading veſſel, or the ſalary of a clerk to a merchant. *Ib.*

10. A man's houſehold goods and furniture are not rateable. *Ib.*

11. But the ſtock in trade of a ſhopkeeper is.

Profits rateable in reſpect of an Intereſt in the Soil.

1. KING *Charles* granted liberty by patent to erect light-houſes at *Harwich*, and towards the maintenance of them certain tolls and duties were made, payable by all ſhips paſſing or coming into that harbour. Part of the duties ariſing from theſe light-houſes are collected at *H.* the reſt at different parts of the kingdom, and no other advantage but the tolls ariſe to the proprietor from the light-houſes. The defendant did not reſide in the pariſh but

but occupied the light-houſes by two of his men, who were kept to attend the lamps, fires, &c. The court were of opinion that the defendant ought not to have been rated. That they have not rated the houſe but the tolls, which are not locally ſituated in the pariſh, and therefore are not rateable there. *Rex* v. *Martin Rebowe Eſq. Mich.* 12 *G.* 3. 1 *Bott* by *Conſt*, 115. *pl.* 158.

2. A dock company convert land in a pariſh into part of a dock, they are rateable to the maintenance of the poor for ſo much of the annual profits of the dock as the proportion of its extent in the pariſh bears to the whole. *Rex* v. *The Dock Company of Hull*, 1 *Term Rep.* 219.

3. The defendant rented four acres of land, with buildings thereon, and a certain well of mineral water thereout ariſing at the yearly ſum of 100*l.* the lands and buildings being of the annual value of 20*l.* He is rated to the poor as for an eſtate of 100*l.*, and the rate is good; for by Lord *Mansfield*, this is not a rate upon the profits of the well, but upon four acres of land, the value of which ariſes partly from the buildings and partly from the ſpring that produces the mineral water. *Rex* v. *Miller*, *Cowp.* 619.

4. A machine houſe, the principal annual value of which ariſes from the uſe of the ſteelyard in it for weighing waggons, &c. is aſſeſſable to the poor. *Rex* v. *St. Nicholas, Glouceſter*, *Cald.* 262, 1 *Term Rep.* 723. *n.*

5. So an houſe with a carding engine in it, deſcribed in the rate *as an engine houſe*, and both let and occupied together, though it does not appear whether the engine is fixed to the building, is conſidered as an entire ſubject, and rateable to the poor to the extent of their annual value. *Rex* v. *Hogg*, 1 *Term Rep.* 721. *Cald.* 266.

6. A barge way and toll gate purchaſed by the city of *London*, by virtue of 17 *G.* 3. *c.* 18. are rateable to the poor in the pariſh where they are ſituated, as well for the tolls which become due there as the other profits, for they have an intereſt in the ſoil, in reſpect of which they take the tolls. *Rex* v. *The Mayor of London*, 4 *Term Rep.* 21.

7. A leſſee of lead mines, whereon no rent is reſerved other than a certain portion of the ore to be raiſed, is not rateable under the 43 *Eliz.*, for the term uſed in it "*coal mines*" expreſsly excludes other mines, and there is a good ground for exempting them, as they are liable to much more hazard and expence. *Governor and Company for ſmelting down Lead* v. *Richardſon*, 3 *Burr.* 1341. *Black.* 349.

8. The defendant was rated for his manor, conſiſting, as was ſtated, of quit-rents, fines for renewal of copyholds, and other caſual fruit, and profits amounting in the whole to 130*l.* a-year. The court were of opinion that they were not rateable. *Rex* v. *Vandewall*, 2 *Burr.* 991. *Black.* 212.

9. Where a leſſee under the crown of certain lead mines received the duties of lot and cope, which are paid by the adventurers,

turers, without any risk or expence to him in working the mines, he is rateable to the poor. *Rowls* v. *Gill & al. Cowp.* 451. *Rex* v. *St. Agnes*, S. P. 3 *Term Rep.* 480.

10. Trespass for taking the plaintiff's cattle on a distress for the poor rate. The question was, Whether the herbage and pannage of a forest were rateable. The cause was tried twice, when the judges at *nisi prius*, Mr. Justice *Blackstone* and Mr. Justice *Ashhurst*, were severally of opinion, that they were not rateable. But the court of King's Bench, on the authority of *The Corporation of Wickham* v. *the Mayor*, cited in 17 *Vin. Abr.* 425. from 3 *Keb.* 540., granted a new trial, that the point might be settled on a special verdict; but it seems not to have come on again. *Jones* v. *Maunsell*, *Dougl.* 289.

11. In *Lord Bute* v. *Grindall*, Lord *Mansfield* Ch. J. was of opinion that the herbage and pannage of a park which were granted to the ranger were not rateable, not having yielded him any profit. 1 *Term Rep.* 358.

12. The tithes of fish are rateable, though the rest of the fish caught may not be so; for the party receives a certain benefit arising from the tithe of fish in the parish, and runs no risk. *Rex Carlyon*, 3 *Term Rep.* 385.

13. A sum of money made payable annually by the owners of land in lieu of tithes is liable to the poors' rate. *Lowndes* v. *Home & al.* 2 *Bl. Rep.* 1252.

14. So are payments in lieu of tithes settled under a compromise between a parson and a parish, and confirmed by act of parliament. *Rann* v. *Picking*, *Cald.* 196.

15. *Vide Rex* v. *Toms*, where a parochial assessment, settled by 19 *G.* 3. *c.* 60. for the vicar of *St. Michael's* in *Coventry*, was held not rateable. *Dougl.* 401.

16. The lessee of a private building covenanted by his lease to use it always as a chapel where the service for the church of *England* should be used, to pay the clergymen and other officers belonging to it, and defray all other expences of its support and maintenance, he receiving *all the emoluments arising from pews or seats therein.* This building is rateable to the poor. *Robson* v. *Hyde*, *Cald.* 310.

17. The warden of the Fleet is assessable to the poor's rate for the profits of his office. *Rex* v. *John Eyles*, *Hil.* 24 *G.* 3. 1 *Bott by Const*, 160. *pl.* 175.

18. *A.* contracts with *B.* and others for certain way-leaves over their lands, and the liberty of making waggon ways in the most convenient direction towards a river for a term of years, paying a certain sum yearly. He obtains leave, but lays no waggon way in any of their lands, except a part in which he is tenant in common with *B.* He has also the use of a waggon way occupied by *C.*, paying him so much *per* ton for the goods carried over it. He is not rateable to the poor for these way-leaves. For *per. cur.* it is only an easement, and if he were rated for his right of passage it would be a double rate, and this is not like the case of

of a grant of land to be uſed in a manner incompatible with any other mode of enjoying it. For if graſs were to grow on the way, the owner of the land would have a right to feed his cattle on it. *Rex* v. *W. Jolliſe*, 2 *Term Rep.* 90.

Ground yielding no Profit.

PART of the ground on which houſes had ſtood, being converted into an acre planted with trees for ornament and yielding no profit, is rateable to the poor. *Rex* v. *Gardiner*, *Cowp.* 79.

The Tolls ariſing from Navigation. Where rateable.

1. THE right of navigation of a river, with the tolls thereof, with power to erect ſluices and ſtaunches, is granted by letters patent. Tolls which are paid for paſſing through each ſluice are rateable to the poor rate of the pariſh in which that ſluice is erected, though the grantee reſides elſewhere, and the tolls are collected in another pariſh. *Rex* v. *Cardington*, *Cowp.* 581.

2. A navigable canal extends 29 miles, 2790 yards of it lie within the local limits of the townſhip of *Leeds*. The proprietors of it are rated to the ſupport of the poor at *L.* for the tolls ariſing out of this navigation, at a ſum conſiderably greater in proportion to the whole produce than that which the length of the canal in the townſhip of *Leeds* bore to the reſt of it. It was argued, that being evidently diſproportionate to the extent of the navigation, the rate was bad, ſince the proprietors were not liable to be rated for more than the proportion of the tolls which became due in the townſhip of *Leeds*, and here they were rated for more; ſo that *L.* received contribution from profits which accrued in other places, and for which the proprietors will be liable there. The court refuſed to quaſh the rate, on the ground that it did not appear to be manifeſtly unequal on the face of it, and they never enter into the queſtion of inequality. But by *Buller* J. If a perſon have property in *Yorkſhire*, and receive it in *London*, he ſhall not be rated for it in *London*. A toll muſt be conſidered to be paid at the place where it becomes due, and not at the end of every mile for that mile; for it is an entire contract to carry the goods the whole diſtance intended, and the hire is payable at the place to which by that contract they are to be carried. *Rex* v. *The Undertakers of the Aire and Calder Navigation*, 2 *Term Rep.* 660.

3. A barge way and toll gate is ſituated in the hamlet of *H.*, and the herbage and paſture of the way are let out to leaſe; the owners of the tolls have an intereſt in the ſoil, in reſpect of which they may be rated for the tolls, which are an adventitious profit ariſing out of the land, and ſuch tolls, as become due in *H.* for navigating

navigating veſſels there, are rateable there although collected in another pariſh. *Rex* v. *The Mayor, &c. of London*, 4 *Term Rep.* 21.

4. By a navigation act, the proprietors are entitled to a toll of 4*s. per* ton for goods carried from *R.* to *N.* and from *N.* to *R.*, and to a proportionable ſum for any leſs diſtance; and they are enabled to collect the tolls at any intermediate place on the navigation, and to diſtrain for them if unpaid. If goods are carried from *R.* to *N.*, this is one integral voyage; the tolls are due at *N.* where the voyage is completed, and are rateable there, though they are collected at ſome intermediate pariſh. *Rex* v. *Page*, 4 *Term Rep.* 543. *Nol. Rep.* 35.

5. Where the tolls of a navigation were veſted by ſtatute in certain commiſſioners, to be applied by them to the purpoſes of the act, *and no other uſe whatſoever*, they are not rateable to the poor. *Rex* v. *The Commiſſioners of Salter's Load Sluice Navigation*, 4 *Term Rep.* 730. *Nol. Rep.* 90.

Property of the Crown and the Public.

1. ROYAL palaces are not liable to be rated. *Rex* v. *Mathews*, *Cald.* 1.

2. Nor buildings applied to public purpoſes. *Lord Amherſt* v. *Lord Sommers*, 2 *Term Rep.* 375.

3. The ranger of a royal park, in which there is incloſed arable land ſowed by the king's ſervants with the ranger's corn, reaped by him for his own benefit, and the ſtraw appropriated to the uſe of the king's horſes, is an occupier of this land, and rateable as ſuch. *Lord Bute* v. *Grindall*, 1 *Term Rep.* 338.

4. An under-keeper of a royal park, occupying ſeparately, by virtue of his office, an houſe and land in that park, is rateable for them to the maintenance of the poor. *Rex* v. *Mathews*, *Cald.* 1.

5. Where the ſcite of a palace is demiſed to a ſubject for a certain permanent intereſt, the grantees who occupy it, are rateable to the poor. *Duke of Portland* v. *The Pariſh Officers of St. Margaret's, Weſtminſter*, at *miſi prius H.* 33 *G.* 2. *Wynne's Analyſis of the Poor Laws, p.* 60.

What Places are not rateable as not having Occupiers.

1. THE apartments in an hoſpital, inhabited by the ſick or by ſervants who attend there for their livelihood, are not rateable, for there are no occupiers to rate. It would be abſurd to call the poor objects of the charity ſo for this purpoſe; neither can the leſſees of the hoſpital, in truſt for the charitable purpoſes to which it applied, be conſidered as ſuch. *Rex* v. *The Occupiers of St. Luke's Hoſpital*, 2 *Burr.* 1053. *Black.* 249.

2. But

2. But thoſe apartments in them which are inhabited by officers belonging to the hoſpital, as the chaplain, may be rated as ſingle tenements, of which theſe officers are the occupiers. *Ib. Eyre* v. *Smallpace*, cited *Burr.* 1059. S. P. Said alſo to be determined by all the judges in the caſe of *Greenwich* hoſpital.

3. Where houſes belonging to an hoſpital had been rated to the poor, and the governors pull them down and erect buildings on the ſcite for the uſe of the hoſpital, and incloſe an area for the benefit of the patients, theſe premiſes are not rateable, for there is no occupier. *Rex* v. *Inhabitants of St. Bartholomew the Leſs*, 4 *Burr.* 2435.

4. A corporation, ſeiſed in fee for their own profit, are to be conſidered as occupiers or inhabitants within the 43 of *Eliz.*, and are rateable to the poor in their corporate capacity. *Rex* v. *Gardner*, *Coup.* 79.

5. An alms-houſe, wholly occupied by objects of a charity or their attendants, and of which no profit is made, although the abſolute property of it is in the perſon who gives the alms, has no legal occupiers, and is not an object of taxation under the poor laws. *Rex* v. *Peter Waldo*, *Cald.* 358.

6. The colonel of a troop of the horſe guards, in conſequence of a warrant under the ſign manual, took a leaſe of ſtables for the uſe of the regiment; no perſons lived there, except two grooms paid to take care of the horſes. The colonel is a truſtee for the public, deriving no benefit to himſelf, and is not rateable as the occupier of the premiſes; and the property in queſtion is to be conſidered either as part of the poſſeſſions of the crown or of the public, neither of which are liable to be rated. *Lord Amherſt* v. *Lord Sommers*, 2 *Term Rep.* 375.

7. But the owner of ſtables, in the pariſh of *Mary-le-bone*, rented by the colonel of a troop of horſe by the authority of the king, for the uſe of the troop, is liable to be aſſeſſed for them to the rates collected in that pariſh, under the 10 *G.* 3. *c.* 23. *Eckerſall* v. *Briggs*, 4 *Term Rep.* 6.

8. Where the ſeſſions found, in the caſe ſtated for the opinion of K. B., that the maſter gunner at *Seaford* was the occupier of the battery houſe there, which was the property of the crown, and that he was removable at pleaſure from his office, the court held that being found occupier precluded the queſtion of his not being rateable, though it might have been contended below that he was not occupier in the legal ſenſe of the word. *Rex* v. *Hurdis*, 3 *Term Rep.* 497.

9. A private ſtatute in 12 *Car.* 2. veſted lands in truſtees for the uſe of a free-ſchool and other eleemoſynary purpoſes, and enacted *that they ſhould be free diſcharged and acquitted from and ſhall not be rated to any manner of public tax, aſſeſſment, or charge whatſoever.* The court were of opinion that the poor rate was a public tax within the meaning of this act, and that the lands are not rateable. *Rex* v. *Scott*, 3 *Term Rep.* 602.

18. Chambers in an inn of court or of chancery are not liable to be aſſeſſed to the poor's rate of the pariſh in which they are ſituated, within the intent and meaning of 43 *Eliz. c.* 2. *Monox v. Horſenail et al. Comyn's Rep.* 534. *Vid.* alſo *Rex* v. *Juſtices of Peterborough, Cald.* 238.

16 Vin. 428. (G) Rates good or not and ſet aſide in what Caſes. Inequality on the Face of it.

1. IT was moved to ſet aſide an order of ſeſſions confirming a rate, whereby the occupiers of land were aſſeſſed at three-fourths of the yearly value, and occupiers of houſes at only one-half, as being on the face of it unequal. *Sed per cur.* Here is no apparent inequality, and we are not to preſume it. There may be reaſons to make a difference between lands and houſes. *Rex* v. *Brograve*, 4 *Burr.* 2491.

2. On an appeal againſt a rate the ſeſſions confirm it, and ſtate the objection to be, that no difference was made in aſſeſſing tenements and farms, conſiſting of lands and cottages or dwelling-houſes, whereas the cuſtom was to rate the former in the proportion of one penny in the pound, and the latter of three farthings, the clear income of the latter being to the former in that rate. *Per* Lord *Mansfield.* The queſtion is, does the rate appear on the face of it to be unequal? Unleſs it manifeſtly does, the court will preſume it equal. Rate affirmed. *Rex* v. *Butler et al. Cald.* 93. *Rex* v. *Hardy, Cowp.* 579. S. P.

3. A rate was appealed againſt as unequal, becauſe lands were rated at a penny and houſes at three farthings in the pound. The ſeſſions quaſh the rate, and order a new equal aſſeſſment to be made, which was affirmed in *B. R.* Lord *Mansfield* C. J. The court has laid down no general rule as to the mode of aſſeſſing houſes and land. The proportion in which they contribute muſt ever depend upon local circumſtances, and if nine-tenths of the burthen ariſe from houſes, it ought to influence the judgment of the court below in adjuſting the proportion. *Rex* v. *Sandwich*, otherwiſe *Swannage, Cald.* 105.

Where raiſed for other Purpoſes than ſupporting the Poor.

1. A Rate cannot be made to reimburſe an overſeer, but only to raiſe money for the relief of the poor; for the ſtatute is expreſsly ſo, and muſt be purſued. An overſeer is not bound to lay out money till he has it; if he does, he muſt make a new rate, and out of that he may retain. But a *mandamus* cannot be granted directing them to make one for the purpoſe. *Towney's* caſe. 2 *Salk.* 591.

2. So

2. So where the title of a rate was "an aſſeſſment, &c. for the neceſſary relief of the poor, and *towards payment of money borrowed for repairing and rebuilding the workhouſe.*" The court were of opinion that one of the purpoſes for which it was made being to repay money borrowed, it muſt be quaſhed on the authority of *Tawney's* caſe. *Rex* v. *Worrell*, *Dougl.* 111.

3. Overſeers may make a rate to reimburſe themſelves for law expences neceſſarily incurred. *Rex* v. *Mickleſield*, *Hil.* 25 *G.* 3. 1 *Bott* by *Conſt*, 78. *pl.* 103.

Where it ſhould be quaſhed. Where amended.

1. APPEAL againſt a rate, becauſe many manufacturers of blankets and other traders were not aſſeſſed in it for their ſtocks in trade. The rate was quaſhed by the ſeſſions on that ground. The court held the order of ſeſſions to be wrong in quaſhing the rate, for they ought to have added thoſe perſons and that property which they thought to be illegally omitted, and quaſhed their order. *Rex* v. *Witney*, 5 *Burr.* 2634. *Bott*, 34. 2 *Black.* 709.

2. So where the ſtock in trade of common brewers and maltſters was omitted, and the rate quaſhed on appeal, the court quaſhed the order of ſeſſions, becauſe they ſhould have amended the rate. *Rex* v. *Ringwood*, *Cowp.* 326.

3. But where a rate was quaſhed becauſe the owner of a number of houſes was rated for them in groſs, and not the occupiers ſeverally, the court were of opinion that the ſeſſions did right, and could not have amended it, for the inſertion of the names would alter the other aſſeſſments. *Rex* v. *St. Catherine's*, *Glouceſter*, *Trin.* 16 *Geo.* 3. *B. R.* Cited in *Rex* v. *Maddern*, *H.* 27 *G.* 3. and relied upon by *Aſhhurſt* J. in giving the opinion of the court.

4. Where a rate was quaſhed for aſſeſſing land and houſes in an unequal proportion, the court were of opinion that the juſtices could do nothing but quaſh the whole rate. *Rex* v. *Sandwich* or *Swannage*, *Cald.* 105.

5. And where a rate was quaſhed by the ſeſſions becauſe the name of the vicar was omitted, and he was not aſſeſſed for the ſmall tithes, the court of K. B. were of opinion, upon deliberation, that the ſeſſions did right in quaſhing the rate; for it is impoſſible to draw the line between the omiſſion of one perſon and that of fifty; and it is not enough to ſay that the more money is raiſed the longer it will laſt, for it may be an inconvenience to many to pay at once double the ſum. *Rex* v. *The Overſeers of Maddern*, 1 *Term Rep.* 625. *Rex* v. *St. Agnes*, 3 *Term Rep.* 480. S. P.

Want of Notice to Perſons inſerted in it.

1. IF the quarter ſeſſions order a rate to be amended, by inſerting the names of perſons who have been omitted, and the order does not ſtate that theſe perſons had notice of the appeal, or that they litigated the queſtion, it is bad; for they are without redreſs, being neceſſarily precluded from appeal thereby. *Rex* v. *Churchwardens of Andover*, *Cowp.* 550.

2. But on an appeal for omitting the vicar in the rate, on which ground it was quaſhed by the ſeſſions, the court were of opinion that no notice need be given to the perſon who is omitted; for the 17 *G.* 2. *c.* 28. only requires it to be given to the churchwardens or overſeers, and ſays nothing of any other perſon; and the complaint is merely againſt them for having done injuſtice, and by thoſe means impoſed a greater burthen on thoſe who are rated than they ſhould have done. *Rex* v. *Maddern*, 1 *Term Rep.* 625.

16 Vin. 429.

(H) Remedies for the Recovery of Rates.

1. A Perſon, who was aſſeſſed to the poor rate, died inteſtate, and adminiſtration was granted to *J. S.*, after which two juſtices executed a warrant reciting the aſſeſſment, and that it appeared on the oath of the overſeers that the ſum aſſeſſed had been demanded of the deceaſed, and of his widow and repreſentative, and that they refuſed to pay. The goods being diſtrained under this warrant, the adminiſtrator brought trover, and the court gave judgment for the plaintiff on the ground that being the repreſentative of the inteſtate, he ſhould have been ſummoned before the juſtices. But the two judges in court ſeemed alſo to incline to the opinion that the goods of the perſon aſſeſſed could not be charged in the hands of his repreſentative, if the *teſte* of the warrant was poſterior to the death; and *Wilmot* J. cited the opinion of *Eyre* Ch. J. in *Wallis* v. *Hewit*, 5 *Geo.* 2. to that effect. *Stevens* v. *Evans*, 2 *Burr.* 1152. *Black.* 284.

2. Juſtices of peace made a warrant to levy a poor rate of *J. S.* It was directed to the conſtables of the pariſh of *A.*, where *J. S.* had lands, but no chattels. The conſtables levied it upon his goods at his houſe in the adjoining pariſh of *B.* within the ſame county; and *Holt* C. J. ruled, at the aſſizes at *Hertford*, that they were well levied. *Hampton* v. *Lammas*, *Lord Raym.* 735.

3. *Averia carucæ* are diſtrainable for a poor rate, although there are other things on the ground more than ſufficient to anſwer the value of the demand. *Hutchins* v. *Chambers et al.* 1 *Burr.* 579.

4. A ſecond diſtreſs may be taken under the ſame warrant, the firſt not being ſufficient to diſcharge the rate, although enough might have been taken on the firſt if the diſtrainer had thought proper. *Ib.*

5. Motion

5. Motion for a *mandamus* to the juſtices of *Middleſex* to ſign a warrant of diſtreſs for levying a poor rate; upon ſhewing cauſe, the affidavits ſtated that it had been the cuſtom not to grant warrants without firſt ſummoning the party to ſhew cauſe, and that they had refuſed on that account. The court were of opinion that this was not a ſufficient cauſe to prevent the granting the writ, and that the juſtices, if they thought it ſufficient, might ſhew it upon the return. *Lee* C. J. and *Foſter* ſeemed of opinion that it was inſufficient, and that they ought to ſign the warrant without ſuch ſummons, for there is no direction in the 43 *Eliz. c.* 2. *ſ.* 4. to do it. *Rex* v. *The Juſtices of Middleſex*, 1 *Bott* by *Conſt.* 207. *pl.* 208.

6. Motion for a *mandamus* to compel the defendants to grant a warrant of diſtreſs to levy a poor rate. It was ſhewn for cauſe that the rate was not publiſhed in the church on the *Sunday* next after it was allowed, purſuant to 17 *G.* 2. *c.* 3. *ſ.* 1. and was therefore a nullity. *Per cur.* As the *mandamus* would be no juſtification to the magiſtrates, we muſt take care not to compel them to do an act which may not be warranted by law. There is here a radical defect in the rate which nothing can cure. Rule diſcharged. *Rex* v. *Newcomb and another*, 4 *Term Rep.* 368.

7. If a landlord tender the poor rate for his tenant, the overſeers muſt receive it, and a warrant ought not to be granted to diſtrain upon the tenant. *Darby* v. *Coſens et al. Dougl.* 426.

Remedies againſt unequal Rates.

1. A *Certiorari* won't lie to remove a poor rate, for if they were removable the poor might be ſtarved while the rates are depending. The remedy is by appeal, or by action, when a diſtreſs is taken. *Rex* v. *Uttoxeter*, *Stra.* 932. *Caſ. of S.* 317. *Rex* v. *The Juſtices of Salop*, 1 *Seſſ. Caſ.* 201. *Stra.* 975. *Rex* v. *King and others*, 2 *Term Rep.* 235.

2. If a perſon be over-rated and appeal, the ſeſſions may amend the rate by leſſening the ſum at which he is aſſeſſed, and need not quaſh it, otherwiſe the 17 *G.* 2. *c.* 38. would be nugatory. *Rex* v. *Cheſhunt*, 2 *Term Rep.* 623.

3. On a motion for a *mandamus* to the overſeer to collect a rate made on the rector of the pariſh, grounded on affidavits that the overſeers had refuſed, aſſigning for cauſe a parol agreement between the inhabitants and the late rector, that the latter ſhould forego his ſmall tithes, and that the aſſeſſment of the latter in the rate ſhould never be collected. The court refuſed it, ſaying that the party had a remedy by indicting the overſeers. *Rex* v. *The Overſeers of the Poor of St. Mary, Norwich*, *Nol. Rep.* 28.

4. A plaintiff, in an action for executing a warrant of diſtreſs upon a poor rate, cannot avail himſelf of any objection to the rate, but if he thought himſelf aggrieved, he ſhould have appealed. *Per* Lord *Mansfield* C. J. *Hutchins* v. *Chambers et al.* 1 *Burr.* 579.

5. A diſtreſs for a poor rate for lands not in the plaintiff's occupation may be replevied, notwithſtanding the ſeſſions on appeal had confirmed the rate. For the juſtices exceeded their juriſdiction, and their determination is a nullity. *Milward* v. *Caſſin*, 2 *Black.* 1330.

6. Juſtices need not be joined with the overſeers in actions of replevin for a diſtreſs taken for a poor rate, for they have only a ſpecial juriſdiction, upon the application of the overſeers, to enforce payment of a tax which the overſeers are preſumed to have regularly made. *Ib.*

7. But in treſpaſs for taking a diſtreſs for a poor rate, the point was whether the plaintiffs, who were rated, were joint occupiers. *Buller*, J. before whom the cauſe was tried, held that to be a queſtion for the ſeſſions, and not to be gone into in that action. *Kettle et al.* v. *Walton*, *Huntingdon Lent Aſſizes* 1780, cited in *Rex* v. *Stotfold*, 4 *Term Rep.* 596. *Nol. Rep.* 70.

16 Vin. 430.

(I) Rates of Pariſhes in Aid.

1. AN order for the contributory pariſh to make a rate at 6*d.* in the pound is ill for incertainty; it ſhould be to raiſe ſuch a ſum certain. *Rex* v. *Telſcombe*, *Stra.* 314.

2. Order of ſeſſions, reciting that the pariſh is not able to maintain its own poor, nor any pariſh within the hundred to contribute, therefore the juſtices at the ſeſſions tax other pariſhes in another hundred within the ſame county, it was moved to quaſh it upon the ground that 43 *Eliz.* gives no authority to the ſeſſions to charge people out of hundreds till two juſtices have inquired whether any pariſh within it can contribute. But by the court, the two juriſdictions are original and diſtinct. The two juſtices have no power out of the hundred, nor the ſeſſions within it, and the order was confirmed. *Rex* v. *Percivall*, *Stra.* 56.

3. Two juſtices tax the inhabitants of the tithing of *Milland* in aid of the pariſh of *St. Peter's*, *Cheſeſhill*, in the ſame county. The ſeſſions confirm the order, and ſtate that this tithing lies *in the ſame liberty of the ſoke*, with the pariſh. The court of K. B. were of opinion that they were not bound down by the particular word "*hundred*," which is uſed in the ſtatute; but that if the ſame diviſion be called by any other term which is equivalent, it is ſufficient. And having referred it back to the ſeſſions for a more particular ſtatement, it appearing ſubſtantially to be an hundred, both orders were confirmed. *Rex* v. *The Tithing of Milland*, 1 *Burr.* 576.

4. Part of a pariſh, maintaining its own poor ſeparately, and having diſtinct overſeers, is, if unable to maintain its own poor, entitled to have a rate in aid under the equity of 43 *Eliz.* *Rex* v. *T. Holbeche Eſq.* 4 *Term Rep.* 778. *Nol. Rep.* 122.

5. But the juſtices of the county cannot rate a pariſh within their juriſdiction in aid of ſuch vill, if it be ſituated in a diſtrict poſſeſſing

poſſeſſing an excluſive juriſdiction, for they have no means of inveſtigating the truth of the complaint. *Rex* v. *Holbeche Eſq.* 4 *Term Rep.* 778. *Nol. Rep.* 122.

6. It is optional in the juſtices to make ſuch a rate either upon the whole pariſh or to tax particular perſons within it. *Ib. Ib.*

Vide Overſeers, Order of Removal, and other proper titles.

Relief of the Poor.

16 *Vin. tit.* Poor.

1. WHERE a baſtard child is born and the parents neglect to provide neceſſaries for it, an order of juſtices is not neceſſary to make the pariſh officers provide for it. *Hays* v. *Bryant*, *H. Black. Rep. C. B.* 253.

2. An order to pay 3*s.* weekly to a perſon ſo long as he ſhall continue poor is bad, for by the ſtatute it ought to appear that they are poor and impotent. *Rex* v. *Highworth*, *Stra.* 10. *Rex* v. *Stoke Purſey*. *Rex* v. *Tipper*, S. P. *Ib.*

3. Order of ſeſſions made on the overſeers to pay a ſurgeon's bill for curing certain poor under their care, quaſhed, for the ſeſſions have no power to make ſuch orders. *Rex* v. *Colbitch*, 1 *Barnardiſt.* 46.

4. So an order upon the pariſh officers by two juſtices to pay 5*l.* on an account of a poor inhabitant of the pariſh when he was in gaol, and for payment of his ſurgeon's and nurſe's bill, was confirmed by the ſeſſions, but quaſhed by the court. The officers had given their pauper relief by employing the perſons to whom theſe debts were due, and they have their remedy by action. *Rex* v. *Woodſterton*, 2 *Barnardiſt.* 207. 247.

5. The ſeſſions cannot make an original order upon the pariſh officers to pay a weekly allowance to a pauper. *Rex* v. *Winſhip and Greenwell*, 5 *Burr.* 2677. *Sed vid. Rex* v. *North Shields*, the opinion of *Willes* J. *Dougl.* 319. and the note there, as alſo *Cald.* 72. ſtating that the court came to no ſuch determination.

6. An order of maintenance is bad if it be not ſtated or found to have been made upon oath. *Rex* v. *Winſhip and Greenwell*, *Cald.* 73.

7. There is no legal authority veſted in the magiſtracy of the county to make an order for the relief of poor perſons *refuſing to go into the pariſh poor houſe*. *Rex* v. *Carliſle*, cited by Mr. *Wallace* from his own note in *Rex* v. *Winſhip and Greenwell*, *Cald.* 72.

8. A woman having four children aſked relief for three, all under the age of ſeven years, and obtained a juſtice's order for the purpoſe, which was confirmed on an appeal to the ſeſſions. The overſeers refuſed to pay, but offered to take her and her three children into the workhouſe eſtabliſhed according to 9 *G.* 1. *c.* 7. *Willes* and *Buller* Juſtices, were of opinion that the whole family ſhould not go to the workhouſe becauſe one of them wanted relief. *Aſhhurſt* J. *contrâ*. But the order of ſeſſions was quaſhed *per tot. cur.*

cur. becauſe no appeal lies from an order of maintenance. *Rex* v. *North Shields, Cald.* 68.

9. The churchwarden and overſeer of *S.* were indicted for diſobeying an order of a juſtice, for the payment of a weekly ſum to *M. G.* for the maintenance of her baſtard child. The queſtion was, whether the defendants were bound to obey the order, the mother having refuſed to go into the workhouſe herſelf, as ſhe only wanted relief for the child, and held that they were bound, for the mother was not obliged to go into the workhouſe under 9 *G.* 1. *c.* 7. *ſ.* 4. *Rex* v. *Haigh & al.* 3 *Term Rep.* 637.

10. On an order of maintenance where the money is directed to be paid weekly, it is due at the beginning of the week. *Rex* v. *John Fearnley*, 1 *Term Rep.* 316.

11. Under the 9 *G.* 1. *c.* 7. *ſ.* 4. which enables *the churchwardens and overſeers*, with the conſent of the major part of the pariſhioners, to contract for the providing for the poor, it is ſufficient if the majority of the churchwardens and overſeers concur in the contract, although ſome of them diſſent. *Rex* v. *Beeſton*, 3 *Term Rep.* 592.

Of Maintenance of the Poor by Townſhips, &c. according to 13 and 14 *Car.* 2.

Vid. Rex v. *Juſtices of Middleſex. Peart and Weſtgarth, &c. ſupra, tit. Overſeers.*

1. A Townſhip for 60 or 70 years (and before for any thing that appeared to the contrary) had ſeparate overſeers, and ſeparately maintained its own poor. They are entitled to maintain their poor ſeparately from the pariſh at large. *Rex* v. *Leigh*, 3 *Term Rep.* 746.

2. If it was formerly inconvenient for the pariſh at large to maintain their own poor jointly, though it were convenient for them to do ſo now, the court won't aſſiſt them in overturning the old practice. But if it ſhould appear that the pariſh had enjoyed the benefit of the 43 *Eliz.* yet if they could not now maintain their own poor jointly, the court would permit them to divide themſelves, provided there be ſuch legal diviſions in the pariſh as are capable of ſupporting their own poor ſeparately under the proviſions of the ſtatute of *Car.* 2. *Per Buller* J. *Ib.*

3. A hamlet within a pariſh had immemorially a ſeparate conſtable, a ſeparate churchwarden, and from 1648 ſeparate overſeers, *the number of which, together with thoſe of the reſt of the pariſh, were more than four.* Both diſtricts have had ſeparate rates immemorially, and have raiſed money in a ſettled proportion of the whole of the expences incurred by the poor of both parts between them ever ſince 1749, which money is ſeparately diſtributed and laid out within the limits of each, by the overſeers of each: *but the whole expences, when incurred, are computed into one integral ſum, and*

and the overſeers of each part account with each other. Orders of removal and certificates have been frequently made by and to the hamlet, but never by or to the reſt of the pariſh. They have a joint poor houſe, and the juſtices in the caſe ſtated for the opinion of the court of K. B. *don't find it as a fact that the pariſh could not reap the benefit of the* 43 *Eliz. Per cur.*—This is only one diſtrict, affording one integral fund for the poor of both parts of it. The two parts account with each other, and when one overpays its proportion, it is repaid by the other, and it is merely for their own convenience that they ſubdivide themſelves; every fact eſtabliſhes that they can have the benefit of 43 *Eliz.* and the contrary is not ſtated as a fact. Thoſe diſtricts therefore cannot now be ſubdivided, and maintain their own poor ſeparately. *Rex* v. *Newell*, 4 *Term Rep.* 266.

Portions. [A]

(A) Raiſed how. By Sale or Mortgage, &c. 16 Vin. 432.

1. DIRECTING a groſs ſum to be raiſed, does not imply that it ſhall be raiſed at once, for it may be raiſed out of the rents and profits, and ſo laid up till it amounts to that ſum. 1 *Atk.* 550. *Okeden* v. *Okeden. Nov.* 1738.

2. Truſt of ſettlement or articles after marriage to raiſe portions for daughters on failure of iſſue male, to whom the eſtate was limited in tail: decreed to be raiſed after failure, notwithſtanding a general releaſe by a daughter, the ſettlement not being known. 2 *Veſ.* 305. 1751. *Hylton* v. *Biſcoe.*

3. Portions decreed to be raiſed under a term in remainder after an eſtate tail and power of revocation. 2 *Veſ.* 310.

4. Marriage ſettlement on huſband and wife for life, and truſt term if no iſſue male, or if all ſhould die without iſſue male before twenty-one, to raiſe portions for daughters, &c. A ſon attained twenty-one, but died in the father's lifetime without iſſue male: the portions are not raiſeable. 2 *Veſ.* 331. *Worſley* v. *Earl Granville. July* 1751.

5. Power to father to raiſe for younger children not exceeding 3000*l.* if no appointment the eſtate charged with 3000*l.* for ſons at twenty-one, daughters at twenty-one or marriage. Nothing veſted in the father's life, and the repreſentative of one who attained twenty-one and became elder, but died in the father's life, not entitled to a ſhare. 2 *Veſ.* 530. 1754. *Loder* v. *Loder.*

6. A power in a ſettlement to raiſe a portion for a younger child at ſuch time as the parent ſhould direct, he directs it to be raiſed when ſhe is fourteen, and ſhe dying, files his bill for it as her adminiſtrator, the portion ſhall not be raiſed for the father. 1 *Bro. Ch. Rep.* 395. *Lord Hinchinbroke* v. *Seymour.* *July* 1784.

2 Vin. 434.

(B) *At what Time* to be raiſed or paid.

1. WHERE there is a term for years for raiſing daughters' portions, payable at a certain time, and a veſted intereſt, they ſhall not ſtay till the death of the father and mother; but the court will lay hold of the ſlighteſt circumſtance in a ſettlement, that ſhews an intention to poſtpone the raiſing them in the life of the father and mother. 1 *Atk.* 549. *Stanley* v. *Stanley, Mich.* 1737.

2. Where a particular time has been appointed for the payment of a portion, the court has enlarged the power of truſtees to raiſe it within the time. *Ibid.* 551.

3. A portion given to one payable at a certain age, and if he die, to another, without mentioning any age; if the firſt die before the time of payment, it veſts in the ſecond immediately. *Ibid.* 556.

4. *J. C.* by will created a term of one hundred years in truſt out of rent, or by mortgage to raiſe portions of 100*l.* for each of the daughters of his ſon *J. C.* payable at eighteen, or day of marriage, and 6*l.* a-year for their maintenance till their reſpective portions became payable, with a proviſo that his ſon *J. C.* may make a jointure of all or any part of the premiſes, and alſo a proviſo that in caſe ſuch perſon who ſhall be next in remainder expectant on the term of one hundred years ſhall pay to the daughters of *J. C.* their portions of 100*l.* before the ſame are due, then the term of one hundred years to ceaſe. *J. C.* had two daughters but no ſon, and left a widow who had a jointure of the whole premiſes; *E. C.* the grandſon of the teſtator by his ſecond ſon, is become tenant in tail under the will; *G. H.* the daughter of *J. C.* who married eighteen years ſince, brought the bill to have her portion raiſed immediately: the portions cannot be raiſed in the lifetime of the jointreſs ſo as to affect her, for when *J. C.* executed the power the eſtate aroſe out of the will of *J. C.*, and is precedent to the one hundred years term. 2 *Atk.* 355. *Hall* v. *Carter, July* 1742.

5. Of late the court has refuſed to raiſe daughters' portions in the lifetime of the father, and ſome times the court has refuſed in favour of the remainder-man. 2 *Atk.* 356. 1742. *Hall* v. *Carter.*

6. Conveyancers now inſert negative words to prevent portions being raiſed in the father and mother's lifetime. *Ibid.* 357.

7. The truſt of a term here was for raiſing portions for a daughter in default of iſſue male, payable at twenty-one or marriage;

riage; the mother died leaving no ſon, and only one daughter, the plaintiff's wife, who, with her huſband, brought this bill againſt the father and the truſtees to raiſe the portions immediately: the court held, ſhe was not entitled to have it raiſed in the father's lifetime. 3 *Atk.* 39. *Stevens* v. *Dethick. Feb.* 1743.

8. The court reluctantly raiſes portions or intereſt on them out of reverſionary terms. 3 *Atk.* 416. 1746. *Lyon & ux.* v. *Duke of Chandos.*

9. Portions are not to be raiſed for the repreſentative of a child dying before he wanted it. 2 *Veſ.* 209. 1750. *Lord Teynham* v. *Webb.*

10. Portions by will are governed by rules from the civil law or eccleſiaſtical court, which are not applicable to a deed. *Hubert* v. *Parſons*, 2 *Veſ.* 262. 1751.

11. The conſtruction of portions is when the children want them. *Ibid.* 263.

12. Settlement by father and ſon, after marriage of the ſon, on the ſon and his wife for their lives, remainder to *Robert* the grandſon and his heirs male, in ſtrict ſettlement, remainder to truſtees for two hundred years; the truſt was declared to raiſe a portion for the daughter of the ſon on the death of the grandſon without iſſue male; a power was given to the grandſon to jointure; the grandſon marries and executes the power and died without iſſue male; held, the portion not raiſeable till after the death of the jointreſs. *Ambl.* 335. *Churchman* v. *Harvey. June* 1757.

13. Portions for daughters in caſe of failure of iſſue male ordered to be raiſed in the lifetime of the mother. *Ambl.* 633. 1766. *Smith* v. *Evans.*

14. Portions charged on a reverſionary fund ſhall not in general be raiſed till the perſon comes into poſſeſſion; yet when it is expreſsly directed under a power, that they ſhall be raiſed as ſoon as may be, they ſhall bear intereſt from the death of the teſtator. 3 *Bro. Ch. Rep.* 267. *Conway* v. *Conway, Trin.* 1791.

(C) How much to be raiſed and paid. And Maintenance in what Caſes. 16 Vin. 439.

1. PORTIONS charged on eſtates to pay in equal rates and proportions are meant to be paid *pro ratâ* as to the value of the eſtates. 4 *Bro. Ch. Rep.* 286. *Wardell* v. *Wardell. Eaſt.* 1793.

2. Settlement on marriage to the uſe of the huſband for life, remainder to truſtees for five hundred years in truſt after the death of the huſband and not before, unleſs with his conſent as therein mentioned, to raiſe portions for younger children, to be paid in ſuch ſhares and at ſuch times as the huſband and wife ſhould appoint, in default of appointment to be paid, if but one beſides an eldeſt or only ſon, 5000*l.* if two 6000*l.* if three 8000*l.*

and

and if four or more 10,000*l.*, equally to be paid reſpectively at twenty-one or marriage, if daughters, if after the age of ſixteen, if ſuch times of payment happen after the death of the huſband; if in his lifetime, then within twelve months after his deceaſe and not before, unleſs with ſuch conſent; provided, that if any of ſuch younger children ſhould die before his, her, or their portions ſhould become payable, ſo that the number ſhould be reduced to leſs than four, no more ſhould be raiſed than what would make the whole ſum for the portion of the ſurvivor or ſurvivors of ſuch younger children, equal to the ſum originally limited for the portion or portions of ſuch child or children, if one, two, or three. Three younger children only ſurvived their father, but more than four had attained twenty-one, the ſum to be raiſed is 10,000*l.* 3 *Veſ. jun.* 51, *Willis* v. *Willis*, *Feb.* 1796.

3. The court leans againſt the conſtruction for raiſing portions or maintenance out of a reverſionary term; and upon that principle, when the term fell into poſſeſſion, and the portion was raiſed, refuſed to charge the difference between the ſum annually allowed by the infant's grandfather for her maintenance, and the ſum charged. 4 *Veſ. jun.* 440. *Lady Clinton* v. *Lord Robert Seymour*. *March* 1799.

16 Vin. 442. (D. 2) Maintenance or Intereſt, payable in what Caſes and from what Time.

1. THE principal of a portion directed to be paid to ſons at twenty-one, to daughters at twenty-one or marriage, with intereſt at 5 *per cent. per ann.* from the death of the father, to the payment thereof; the intereſt ought not to accumulate till the portions are payable, but to be paid annually, for it is given as a recompence in the meantime, till the principal becomes due. 1 *Atk.* 553. *Boycott* v. *Cotton*. *Nov.* 1738.

2. Whether a portion charged on land be given with or without intereſt, by deed or will, if the perſon die before it becomes payable, it ſhall ſink in the eſtate. *Ibid.* 155.

3. But the maintenance is a preſent charge, and is not poſtponed till the term comes into poſſeſſion, and no harm can ariſe from mortgaging the reverſion, as the arrears muſt be ſatisfied the moment the terms come into poſſeſſion. 2 *Atk.* 357. 1742. *Hale* v. *Carter*.

4. And the defendant cannot redeem the term and exonerate the eſtate without paying intereſt for the portions the moment they become due. *Ibid.* 358.

5. Portion on real eſtate carries intereſt, though not mentioned. *Earl of Pomfret* v. *Lord Windſor*. 2 *Veſ.* 487. 1752.

6. Portions for younger children under a ſettlement; the father provides otherwiſe for one, intending 10,000*l.* each for the reſt. They are confined to that, and are not alſo to claim an equivalent for the other ſhare out of the proviſion made. It would be

be otherwiſe if they had no other ſatisfaction. 2 *Veſ.* 123. 1750. *Duke of Bridgewater* v. *Egerton.*

(E) Who is entitled by the Limitation, and how. 16 Vin. 444.

BY ſettlement on the marriage of *H. A.* with *J. C.*, in caſe there was no iſſue male, and there ſhould be daughters living at the death of the father, who ſhould attain twenty-one, or be married, then ſuch daughters ſhould have 2000*l.* a-piece; there were no ſons, and three daughters only; the defendant, who was one, married *A. D.* and previous to his marriage covenanted to aſſign, with his wife's conſent, 500*l.* to truſtees in truſt after the death of *A. D.*, and the defendant to pay it amongſt the children of the bodies of the defendant and *A. D.*, and that he ſhould, after the marriage, aſſign to the truſtees all the money and ſecurities for it then due and belonging to the defendant. *H. A.* died in 1744, *A. D.* in 1745, inteſtate, to whom the defendant adminiſtered and received the 2000*l.*; the children, who are a ſon and a daughter, have a right to the portion, and decreed to be ſecured for their benefit. 3 *Atk.* 530. *Buſh* v. *Dalway. July* 1747.

(G) Veſted in what Caſes. 16 Vin. 444.

1. ON a ſettlement previous to a marriage, the truſt of a term was in caſe the huſband ſhould have no iſſue male, and there ſhould be iſſue daughters, *&c.*, to raiſe, if two daughters, 25,000*l.*, to be paid to them when they attain twenty-one or are married, but not to be raiſed till after the death of their grandfather; the father died, and left iſſue two daughters only; the grandfather is dead; bill by plaintiff in right of his wife, one of the daughters, for 12,500*l.* and intereſt from the time of the marriage: held, the portion veſted at the marriage, and therefore intereſt was decreed. 3 *Atk.* 416. *Lyon* v. *Duke of Chandos. Feb.* 1746.

2. Portions in a ſettlement of a term after the mother's death for the defendant, to grow due and payable at twenty-one or marriage, one daughter after twenty-one and marriage, died in the lifetime of the mother; her portion ſhall go to her repreſentative, and not to her ſiſter. 1 *Veſ.* 208. *Emperor* v. *Rolfe. Feb.* 1748.

3. By marriage ſettlement 1500*l.* were provided for younger children in ſuch ſhares as the parents ſhould appoint, in default of appointment to all the children after the death of the wife; the parents afterwards made an appointment excluding one child: this deed veſts the portions in the other childrn, born or to be born. 1 *Bro. Ch. Rep.* 162. *Mayhew* v. *Middleditch. Trin.* 1782.

4. Portions by a marriage ſettlement to be paid, transferred, or aſſigned to the ſons at twenty-one, to the daughters at twenty-one,

one, or marriage, if after the deceaſe of their parents, with ſurvivorſhip among them, if any ſhould die before the ſhare or ſhares ſhould become payable, aſſignable, or transferable, and a limitation over, if there ſhould be no child or children living at the death of the ſurvivor of the parents, or being ſuch, all ſhould die before the fund ſhould become ſo as aforeſaid payable, aſſignable, or transferable. Whether a child attaining 21 takes a veſted intereſt in the life of the parent? *Quære.* 5 *Veſ. jun.* 452. *Legh* v. *Haverfield.* 1800.

16 Vin. 451. (K) Lapſed in reſpect of the Settlement not being made.

1. THE wife's portion has been decreed to the huſband, though he has not made a ſettlement adequate to it, where the ſettlement was before marriage; otherwiſe on a voluntary ſettlement after marriage. 2 *Atk.* 448. *Lanoy* v. *Duke of Athol.* Nov. 1742.

2. The huſband by marriage articles agrees to ſettle an eſtate, and the wife's portion is to remain in truſtees, till the ſettlement. No ſettlement is made, nor any eſtate applied, and the huſband dies. The right to the portion ſurvives to her, and the iſſue are not entitled to take it out of her hands. 1 *Veſ.* 376. *Pyke* v. *Pyke.* *Jan.* 1749.

For more of *Portions*, ſee *Charge*, *Deviſe*, *Marriage*, *Powers*, and other proper titles.

[A]

Poſſeſſion.

(F) Privileges of Poſſeſſion.

1. WHERE *A.* drew on *B.* at *London*, and ſent bills to anſwer the ſame, directing them to be put to a particular account, and *B.* became bankrupt before paying the bills drawn on him, his aſſignees were decreed to deliver the bills ſent to him to anſwer the ſaid drafts; and Lord *Hardwicke* ſaid he remembered a caſe in the Common Pleas where goods, conſigned to a factor, were ſold, and notes, inſtead of money, given for them, and the principal was held to be entitled to the notes. *Ex parte Dumas*, 1 *Atk.* 232. and 2 *Veſ.* 582. S. P. *Zenk* v. *Walker*, 2 *Bl. Rep.* 1154. and *Ex parte Ourſell*, *Ambl.* 297.

2. Where

2. Where a perſon, who had repaired a ſhip belonging to a bankrupt, gave up the poſſeſſion, he was held to have loſt his lien thereon; if the repairs had been in a foreign port, while on a voyage, it would have been otherwiſe. *Ex parte Shank*, 1 *Atk.* 234.

3. Where a miller had claims upon a bankrupt for grinding former quantities of wheat, yet he was held not to have a lien on that in his poſſeſſion, except for the price of grinding it alone. *Ex parte Ockenden*, 1 *Atk.* 235.

4. A packer was held to have a lien on the goods in his poſſeſſion for all ſums due to him as ſuch, although not on other goods; for, by the cuſtom of the trade, he is in the nature of a factor. *Ex parte Deeze*, 1 *Atk.* 128. But ſee obſervations on this caſe, 4 *Burr.* 2222.

5. A factor was held to have a lien on the goods in his poſſeſſion for the general balance. *Kruzer* v. *Wilcox*, at the Rolls, 12th *March* 1754, cited in 1 *Burr.* 494. *Ambl.* 252. S. P. *Foxcroft* v. *Devonſhire*, 2 *Burr.* 931.

6. A dyer, having cloth in his poſſeſſion, was held to have a lien on it only for the price of dying it, not for his general balance for dying other clothes. *Green* v. *Farmer*, 4 *Burr.* 2215.

7. A factor, who had become ſurety for his principal, ſold goods for him before his bankruptcy, but did not receive the money till after; and the vendee having paid over the price to him, after notice from the aſſignees to the contrary, an action was brought againſt him; it was held that the factor had a lien on the money in the hands of the vendee for the amount of the ſum for which he was ſurety, though not then paid; and therefore that the action did not lie. *Drinkwater* v. *Goodwin*, *Cowp.* 251.

8. Where a navy bill, payable to the defendant, was lodged with the plaintiff as a ſecurity, and he delivered it over to the defendant in confidence that he would accept a bill drawn upon him to the amount; although the plaintiff could make no uſe of the navy bill himſelf, yet he was held to have a lien upon it in the defendant's hands; and he, having received the amount, was compelled to pay over the ſame. *Pierſon* v. *Dunlop*, *Cowp.* 571.

9. A vendor, before actual poſſeſſion by the vendee, has a lien on the goods he ſends, and if he can get them *in tranſitu* has the benefit of that lien. *Berkett* v. *Jenkins*, *B. R.* 11 *G.* 3. cited in *Cowp.* 295, 296.

10. Goods were delivered to a perſon claiming them wrongfully, who paid freight and other charges thereon; it was held that he had no right to retain the goods for thoſe charges. *Lempriere* v. *Paſley*, 2 *Term Rep.* 485.

11. S. left by his will certain plate to truſtees to the uſe of his wife for life, remainder over; ſhe pawned the plate to the defendant, who was ignorant of the ſettlement; on a claim by the remainder-man, the counſel for the defendant admitted that he could not retain. *Hoare* v. *Parker*, 2 *Term Rep.* 376.

12. Where

12. Where goods are ſent to a factor, but not in his actual poſſeſſion, he has no lien thereon for his general balance, and the goods may be ſtopped *in tranſitu* if he becomes bankrupt. *Kinlock* v. *Craig*, 3 *Term Rep.* 122. 787.

16 Vin. 458, (G) Sufficient for what Purpoſes as to Actions.

1. IN an action by an owner of an ancient ferry againſt a perſon who erects a new ferry near his, the plaintiff may declare on his poſſeſſion; and he need not ſet forth in his declaration that he keeps boats and ferrymen ſufficient to carry paſſengers over. *Bliſſet* v. *Hart*, *Willes*, 508.

2. Poſſeſſion is a ſufficient title to the plaintiff in treſpaſs *vi et armis*; and where any perſon is in poſſeſſion, this (and not treſpaſs on the caſe) is the proper action for any injury done to the land or the profits of it. *Harker* v. *Birbeck*, 3 *Burr.* 1556.

3. Poſſeſſion for above ſixty years of a pew in a church is not a ſufficient title to maintain an action upon the caſe for diſturbance in the enjoyment of it. *Stock* v. *Booth*, 1 *Term Rep.* 428.

4. A poſſeſſion for twenty years is like a deſcent which *tolls* entry, and gives a right of poſſeſſion, which is ſufficient to maintain an ejectment. *Per Holt* C. J. *Vide Run.* on *Ejectm.* 59.

16 Vin. 459. (H) Sufficient as to other Purpoſes than Actions.

1. *POSSESSION* gives a right againſt every man who cannot ſhew a good title: the party therefore who would *change* the poſſeſſion muſt *firſt* eſtabliſh a legal title to it.

2. By one of the ſtatutes of limitations (21 *Jac.* 1. *c.* 26.) none ſhall make *an entry* on land but within twenty years after the right or title ſhall firſt deſcend or accrue. But the act hath the uſual ſavings for infants, feme-coverts, *&c.* Therefore in ejectments, where there hath been *no poſſeſſion for twenty years*, either in the leſſor, or the plaintiff, or his anceſtors, the plaintiff in this action will be nonſuited; unleſs he can account for it under ſome of the exceptions allowed by the ſtatute. *Taylor ex dimiſſ. Atkyns* v. *Horde*, 1 *Burr.* 119.

3. And twenty years *adverſe poſſeſſion* is not only a negative bar to the action or remedy of the plaintiff, but takes away his right of poſſeſſion and gives a poſitive title to the defendant, for the plaintiff muſt ſhew a right of *poſſeſſion* as well as of property, and therefore the defendant need not plead the ſtatute of limitations as in other caſes. *Ibid.*

4. If no other title appears, a clear undiſturbed poſſeſſion for 20 years is evidence of a fee. *Runn. on Ejectment*, *p.* 59.

5. By the 9 *G.* 1. *c.* 16. a time of limitation is extended to the caſe of the king himſelf, who is thereby diſabled to make title except to liberties and franchiſes beyond the ſpace of *ſixty years*, to be reckoned,

reckoned, backward from the time of commencing any ſuit or proceeding to recover the thing in queſtion. So that now a poſſeſſion for 60 years will be even a bar to the king's prerogative, in derogation from the ancient maxim of *nullum tempus occurrit regi*.

(I) Pleadings. *Poſſeſſionatus fuit.*

16 Vin. 459.

1. THE plaintiff declared in treſpaſs upon his poſſeſſion, the defendant makes a title, and gives colour to the plaintiff; the plaintiff replies *de injuria ſua propria*, and traverſes the title ſet out by the defendant, and upon demurrer, the court held this a good replication, for it lays the defendant's title out of the caſe, and then it ſtands upon the plaintiff's *poſſeſſion*, which is enough againſt a wrong-doer, and the plaintiff need not reply *a title*. *Cary* v. *Holt*, 2 *Stra.* 1238.

2. Where the plaintiff declares upon a poſſeſſion only, and the defendant pleads *liberum tenementum*, the plaintiff muſt ſhew a title in the replication, and muſt not barely rely on traverſing the defendant's title. *Vernon* v. *Goodrich*, *C. B.* 1 *Stra.* 5.

3. If the defendant, committing the tort, be owner of the ſoil, the plaintiff muſt ſhew a title; but the declaration is good with the allegation of any title in the plaintiff, if the defendant be a ſtranger; for poſſeſſion is ſufficient in this caſe to maintain the action for the plaintiff. *Stroud* v. *Birt*, 1 *Com. Rep.* 7.

4. A *cuſtom*, to take a profit *in alieno ſolo*, is bad; ſuch a right can only be claimed by *preſcription*. And *per Aſhhurſt* J. When a plaintiff in poſſeſſion brings an action on the caſe againſt a wrong-doer, it is ſufficient *to declare* againſt him upon poſſeſſion generally, without diſcloſing any title; but where it becomes neceſſary to juſtify under a right *in a plea*, ſuch right muſt be ſet out formally. *Grimſtead* v. *Marlowe*, 4 *Term Rep.* 718.

5. In an action upon the caſe for the *diſturbance* of rights of *common*, *&c.* there is this diſtinction; where the action is brought againſt a *wrong-doer*, it is ſufficient for the plaintiff to ſtate in his declaration, that he was *poſſeſſed* of a houſe or lands, *&c.* and by reaſon of his poſſeſſion thereof, was entitled to the right in the exerciſe of which he has been diſturbed: but where the plaintiff would lay any charge or ſervitude on the land or property of another, he muſt ſet forth his title *ſpecially* in the *declaration*. *Vide Waring* v. *Griffiths*, 1 *Burr.* 440. 1 *Stra.* 5. 4 *Term Rep.* 718. But ſee 3 *Term Rep.* 768.

6. Caſe for diſturbing the plaintiff in his pew. The declaration ſtated that the plaintiff had a right to this pew, *without laying it to be appurtenant to a meſſuage* in the pariſh. At the trial of this cauſe before *Buller* J. the plaintiff did not ſet up any claim under a faculty from the biſhop, or ſhew any enjoyment in reſpect of any houſe, but offered evidence of *poſſeſſion* for above 60 years, and would have derived a regular title from one *Chappel*, to whom the miniſter and churchwardens in the year 1718 gave their conſent

ſent in writing to build the pew in queſtion. The judge being of opinion that this did not entitle the plaintiff to recover, directed a nonſuit. A motion was made to ſet aſide this nonſuit, but the rule was diſcharged. The plaintiff muſt prove a preſcriptive right, or a faculty, and ſhould claim it in his declaration *as appurtenant to a meſſuage in the pariſh.* *Per Buller* J. This is an *action on the caſe*, and not an action *of treſpaſs*. *Treſpaſs* will not lie for entering into a pew, becauſe the plaintiff has not the excluſive poſſeſſion, the poſſeſſion of the church being in the parſon. The word 'poſſeſſion' muſt always be underſtood *ſecundum ſubjectam materiam.* Therefore in an action on the caſe for diſturbing the plaintiff in his pew, for which treſpaſs will not lie, the plaintiff muſt prove a right either by preſcription, or by faculty. *Stocks* v. *Booth*, 1 *Term Rep.* 428.

7. In declaring for wrongs to *perſonal* property, the plaintiff muſt ſtate his right, as in treſpaſs for taking goods, that they were his own goods; or in trover, that he was poſſeſſed of them. *Franklyn* v. *Reeve*, 2 *Stra.* 1023. 1 *Ld. Ray.* 239. 2 *Ib.* 890. *acc.*

8. In an action for diſturbing plaintiff in his pew, the ſingle queſtion was, Whether the plaintiff can maintain this action without proving repairs done to the pew? *Lee* C. J. It is objected for the defendant, that as repairs were laid in the declaration and not proved at the trial, the *poſtea* ought to be delivered to the defendant; but we are all of opinion, that this being a *poſſeſſory* action againſt *a ſtranger*, and a mere *wrong-doer*, the plaintiff was not obliged to prove any repairs done by himſelf or others whoſe eſtate he hath: for it is a rule in law *that one in poſſeſſion need not ſhew any title or conſideration for ſuch poſſeſſion againſt a wrong-doer.* But it is otherwiſe where one claims a pew, or an aiſle in a church againſt *the ordinary*, who undoubtedly has *prima facie* the diſpoſal of all the ſeats in the church; and againſt him a title or conſideration muſt be ſhewn in the declaration and proved, as the building or repairing, *&c.*; and this is the true diſtinction. *Kenrick* v. *Taylor*, *B. R.* 1 *Wilſ.* 326.

9. In an action on the caſe againſt a *wrong-doer* for not repairing a private road leading through the defendant's cloſe, it is ſufficient to allege that defendant, *as occupier* of the ground, is bound to repair.

10. Every plaintiff in ejectment muſt ſhew a right of *poſſeſſion* as well as of property: and therefore the defendant need not plead the ſtatute, as in the caſe of other actions. 1 *Burr.* 119.

Poſtea.

[G]
16 Vin. 464.

1. THE court will not, at a diſtance of time after the trial, amend the *poſtea* by increaſing the damages given by the jury, although all the jurymen join in the affidavit, ſtating their intention to have been to give the plaintiff ſuch increaſed damages, and that they conceived what they had given was calculated to give him ſuch a ſum. *Jackſon* v. *Williamſon*, 2 *Term Rep.* 281.

2. On a motion for a new trial the *poſtea* was brought into court, and after the new trial had been denied the *poſtea* could not be found; the court, on debate, ordered a new one to be made out from the record above, and the aſſociate's notes. *Dayrell* v. *Bridge*, 2 *Stra.* 1264.

3. When, on the argument of a ſpecial verdict in ejectment, the court of Common Pleas gave judgment for the leſſor of the plaintiff, the court, on motion ſtayed the *poſtea* until the event of a writ of error (which the defendant intended to bring) ſhould be known, on the defendant's undertaking to account for the meſne profits from the day of the demiſe. *Roe* v. *Jones*, 1 *H. Black.* 34.

4. *William* v. *Jones and another*, *Eaſt.* 8 *G.* 2. A verdict in this caſe was taken by miſtake of the aſſociate generally for plaintiff againſt both defendants, inſtead of finding defendant *Edward Jones* not guilty; as to the other defendant a verdict was found for the plaintiff, damages 200*l.*; plaintiff moved, that the return of the *poſtea*, as to *Jones*, might be amended, which was ordered on the chief juſtice's report, and hearing counſel on both ſides. The return of the *poſtea* is the act of the chief juſtice, and muſt be made as it ought to be. *Barnes*, 6.

Powers.

16 Vin. 446.

(*For the diſtribution of Powers, ſee extract from* Butl. *note in* (A. 16) *infra.*)

Note, the three firſt of the enſuing titles relate wholly to powers of *leaſing*.

16 Vin. 471. (A. 3) Where the Power is purſued. In reſpect of the *Years* or *Lives* limited (*in the leaſe.*) [And herein of Leaſes in *Poſſeſſion* and *Reverſion.*]

1. THE ſtatement given in 16 *Vin.* 474. *pl.* 2. from *Croke*, of the caſe of *Shecomb* v. *Hawkins*, differs ſomewhat from that contained in *Yelvert.* 222. and 1 *Brownl.* 148. both of whom report this caſe as follows: *L.* levied a fine of lands to the uſe of herſelf for life, and after to the uſe of her eldeſt ſon in tail, reſerving to herſelf power to make leaſes at any time for 21 years, or for three lives, rendering, &c. *L.* leaſed part of the premiſes to *B.* for 21 years, and before that leaſe expired, made another leaſe to *B.* for 21 years, *to begin after the determination* of the former leaſe, and died. The firſt leaſe expired. A queſtion then aroſe, Whether this were a good leaſe under the power? and it was adjudged, that it was not; for, upon ſuch power, *L.* could not make a leaſe to commence at a day to come, but was confined to a leaſe in poſſeſſion, and could not convey *an intereſt* to commence *in futuro*, or after another eſtate expired: but the law would adjudge, upon a *general* power, to make leaſes, *without ſaying more*, that they ought to be leaſes in poſſeſſion; and the court ſaid, that it had been adjudged accordingly in the caſe of *The Counteſs of Suſſex*, ſtated in 16 *Vin.* 467. *pl.* 6. and ſide note.

2. It appears, from the report in 1 *Roll.* 12. of the caſe of *Fox* v. *Prickwood*, (ſtated in 19 *Vin.* 140. (E. a) *pl.* 3.) that *Coke* did not, in giving his judgment thereon, inſiſt upon the word *poſſeſſion*: but *G. Crooke* obſerved, that it was limited, that "he might leaſe *in poſſeſſion*," and that *this* extended to lands THEN in *poſſeſſion*, and not to thoſe *then* in *reverſion*; and then, thoſe of which this leaſe was made, were lands *then* in reverſion. *Coke* however ſaid, that it was intended, that he might at any time leaſe in poſſeſſion; for that the word *poſſeſſion* was to be referred to the leaſe, and not to the land.

3. *A. B.* was tenant for life under a ſettlement of *the reverſion of lands that were in leaſe for lives*; with a power, "that it ſhould "be lawful for every perſon who ſhould be actually ſeiſed of the "freehold of the premiſes, to make leaſes of any part thereof, "which had been uſually letten for lives or years by indenture, "for any term not exceeding twenty-one years, or determinable "on one, two, or three lives, &c.; ſo, as there were not, in any "part of the premiſes ſo leaſed, at any one time, any more or "greater eſtate or eſtates than for 21 years, or for three lives, or "for any number of years determinable upon three lives." *A. B.* made ſeveral leaſes for 99 years, to commence from the death of a remaining life in a former leaſe. And the queſtion was, If this leaſe was purſuant to the power? It was objected, that it was a leaſe

leaſe in reverſion. But it was anſwered, and *reſolved*, that, when the *reverſion* of lands *demiſed* for life or years is ſettled to the uſe of one for life, with a *power* to make leaſes *generally*, he may make a leaſe *during the continuance* of a former leaſe, to *commence* after the former; as *otherwiſe* his power would be ineffectual. *Earl of Coventry* v. *Lady Coventry*, *Com.* 312.

4. Teſtator deviſed the lands to his ſon for life, remainder over; with a proviſo, that if his ſon made any alienation or diſcontinuance, whereby the premiſes could not remain, *&c.* as appointed by the ſaid will, otherwiſe than by a leaſe for 21 years, whereupon the old and accuſtomed rent ſhould be reſerved, that *then* ſuch perſon ſhould forfeit his eſtate. The ſon afterwards, in 4 *Mariæ*, leaſed to *B.* for 21 years, rendering the ancient rent; and then, 18 *Eliz.* leaſed unto *R.* and his wife for one-and-twenty years, to *begin preſently*, (which was one year before the expiration of the leaſe made to *B.*) which leaſe being expired, *R.* entered. And the queſtion was, Whether the laſt leaſe, though to begin from the date of it, being made a year before the former expired, was authoriſed by the power? And it was moved that, although by this authority he could not make leaſes in reverſion, for then he might charge the inheritance in *infinitum*; yet ſuch a leaſe as this he might make well enough, ſince it was to begin preſently, and ſo was no charge to him in reverſion, for the inheritance was not charged *in the whole* for more than one-and-twenty years, and the court ſeems to have been of this opinion; for the reporter ſtates nothing as to the event of this caſe. *Read* v. *Naſh*, 1 *Leon.* 147. And ſee *Fox* v. *Collier*, 1 *Anderſ.* 65. And cited 1 *Leon*, 36.

5. *A. B.* was tenant for life under a ſettlement in which there was the following power, *viz.* "That it ſhould be lawful for the "tenants for life, *reſpectively*, at all times during their reſpective "lives, and when they ſhould reſpectively come into *and be in* "*actual poſſeſſion*, by indentures to demiſe all or any of the ſaid "premiſes in poſſeſſion, but not by way of reverſion or future in-"tereſt, for the term of 21 years abſolute, or any leſſer abſolute "term, or for any term or number of years determinable upon "one, two, or three lives; reſerving, *&c.*" Part of the premiſes ſubject to the power were let by the agent for tenant for life, by agreement in writing, from 15th *March* 1775, to occupy till 10th *March* 1776, and the reſt was, at the time of the leaſe, in the occupation of tenants at will. Afterwards, on 17th *Auguſt* 1775, *A. B.*, by indenture, reciting the power, demiſed this and other part of the premiſes to *F.* for 99 years, from *Lady-day* then laſt paſt, if ſhe ſhould ſo long live, at the yearly rent of, *&c.* At the time of the leaſe *A. B.* directed the occupiers to pay the rents to *F.*, which they conſtantly afterwards did. It was contended, amongſt other points, in this caſe, that the leaſe to *F.* was a leaſe *in reverſion*, and therefore contrary to the power. *A. B.* could not, it was ſaid, at the time of this leaſe, grant an immediate leaſe in poſſeſſion, becauſe part of the premiſes were let under an agreement for a term, of which ſeveral months were then

to run; and, though the reſt was ſtated to have been in the hands of tenants at will, yet, as the law then ſtood, they muſt be conſidered as tenants from year to year; *A. B.* could not have brought ejectment againſt any of them, and therefore had no *immediate poſſeſſory right*; ſuch right, and the right to recover in ejectment being convertible. But it was anſwered, *Firſt*, That the tenants aſſented to this leaſe, and ſurrendered their poſſeſſion before the execution of it, in order to make it valid. This was expreſsly left by the judge to the jury, who found, that *F.* was in poſſeſſion at the time of the execution. *Secondly*, That, if the jury had not found the leſſee to have been in poſſeſſion, *ſtill this would be good as a concurrent leaſe*; for this *Read* v. *Naſh* (already ſtated,) was cited. No authority, it was ſaid, had been cited againſt this caſe. *Thirdly*, That, in reſpect of the power, all the ſubſiſting leaſes were leaſes at will; there was no outſtanding leaſe, as againſt the remainder-man; he would not have been bound to give the tenants notice to quit, but might have entered upon them immediately. And, for theſe reaſons, the court unanimouſly held the leaſe to be good. *Goodtitle* v. *Funucan*, *Dougl.* 565. See *Wilſon* v. *Sewell*, ſtated in Suppl. tit. *Eſtate*, (R. a) *ante*, 8th queſt. in *Campbell* v. *Leach*, *Ambl.* 743, 4. 6.

6. Lands were conveyed to the uſe of *T.* for life, remainder to *W.* for life, remainder over; with power for *W.* if he ſurvived *T.* to make leaſes for 21 years or three lives, *in poſſeſſion*, and not in reverſion. *W.* ſurvived *T.* and then demiſed the lands, with all the circumſtances of formality required by the power, for three lives; *habendum from the date thereof*. And it was held in *B. R.* that the leaſe was of a freehold to commence *in futuro*, and therefore void. *Denn* v. *Farnſide*, 1 *Wilſ.* 176. See *Freeman* v. *Weſt*, ſtated in Suppl. tit. *Eſtate*, (Z. a) *ante*.

7. A leaſe was granted by the crown to the Counteſs of *Portland* for 50 years, to commence "*from the day of the date or making.*" To impeach this leaſe an information was ſome time afterwards filed by the attorney-general on the part of the crown. The principal objection was formed upon the civil-liſt act, 1 *Anne*, *ſtat.* 1. *c.* 7. which directs, that "all leaſes, to be granted "of any of the crown-lands ſhould be void, *unleſs made to com-* "*mence* from *the date* or *making* thereof;" and it was contended, on the part of the crown, that "from the date," and "from the making," *were incluſive*; but, that "from the day of the date," was *excluſive*, and therefore the leaſe was void for the variance. On the part of the counteſs, it was contended, that theſe phraſes were both the ſame. Sir *Thomas Parker* and Mr. Baron *Reynolds* admitted the objection, that it was a void leaſe, becauſe it commenced *in futuro*. The two other barons were of a different opinion upon this point; but, upon another point, they were alſo of opinion, that the leaſe was void. So that, for different reaſons, they all held that the leaſe was not good. *Attorney-General* v. *Counteſs of Portland*, *Cowp.* 723.

8. *B.* de-

8. *B.* deviſed lands to her nephew for life, with a power, by any writing, *&c.* to leaſe the premiſes for the term of 21 years, or under, or for any term or number of years, determinable upon one, two, or three lives, *in poſſeſſion*, and not in reverſion. The nephew leaſed *from the day of the date thereof*, for the term of 99 years, if three perſons, or any of them, ſhould ſo long live. This was held to be a leaſe in reverſion. *Doe* v. *Watton*, *Cowp.* 189.

9. Tenant for life by marriage ſettlement, with a power to leaſe for any term or number of years not exceeding 21 years, in *poſſeſſion, and not in reverſion, remainder, or expectancy*, made a leaſe by indenture, "to hold," *&c. from the day of the date of the ſaid indenture*, for 21 years. The queſtion was, Whether this was a good leaſe within the power? Lord *Manſfield*, in delivering the opinion of the court of *B. R.*, firſt conſidered the caſe as a new queſtion, unaffected by any previous deciſion; in which light the whole turned upon the conſtruction of the particle "*from*." In grammatical ſtrictneſs, his lordſhip ſaid, the ſenſe of this word muſt always depend upon the context and ſubject-matter, whether it ſhould be taken *incluſive* or *excluſive* of the *terminus a quo*; and more than a hundred inſtances, he added, occurred to him, in which it was uſed both ways. Here, it was the intention of the parties, in order to comply with the terms of the power, that it ſhould be taken *incluſively*. He then proceeded to conſider the queſtion upon the authorities; and theſe appeared to him to be contradictory. In the courſe of this diſcuſſion he informed the court, that he had determined the (above ſtated) caſe of *Doe* v. *Watton* upon the authority, in a great degree, of the (above ſtated) caſe of *The Attorney-General* v. *The Counteſs of Portland*; but Sir *Thomas Parker*, who was of opinion in that caſe, that the leaſe was void, had doubts upon the determination, after communicating with his lordſhip on the ſubject; and had given him leave to expreſs his approbation of the determination of the caſe then before the court. And the court unanimouſly held the leaſe to be good. *Pugh* v. *Duke of Leeds*, *Cowp.* 714. See *Powell on Powers*, 450. *et ſec.* and *Rex* v. *The Inhabitants of Gamlingay*, 3 *Durnf. & Eaſt*, 513.

(A. 4) Where the Power is purſued; in reſpect of the *Rent* [*or Covenants*,] reſerved [or contained.] 16 Vin. 472.

1. A Power was reſerved in a ſettlement to ſucceſſive tenants for 99 years, determinable on their lives, as and when they ſhould be in poſſeſſion, *&c.* to leaſe all or any part of the hereditaments, for any term not exceeding 21 years, or for one, two, or three lives, or for any term of years determinable upon the death of one, two, or three perſons in poſſeſſion; *ſo as* upon every ſuch *leaſe* of ſuch *parts* of the premiſes as had been *anciently* and *accuſtomably* demiſed, whereof fines had been uſually taken, the old, uſual, and *accuſtomed* yearly *rent* or *rents*, or more, ſhould

be yearly reſerved during the continuance thereof reſpectively; and ſo as, upon every leaſe of *ſuch part* of the premiſes, as *had not* been *uſually* let, and for which there *had not been any fine or fines* formerly taken, there ſhould be reſerved, during the continuance of the ſame reſpectively, the *moſt* and *beſt improved* yearly rent; and ſo as the leſſee or leſſees ſhould reſpectively execute counterparts of the leaſes. A tenant in poſſeſſion, not having any rolls or old leaſes to guide him, as to the reſervation of the old rents (all or moſt of them being in the remainder-man's hands, who refuſed to deliver them), made a leaſe, by indenture, of "all "the hereditaments, compriſed in the ſettlement, which had been "*uſually letten*, and *fines taken* for the ſame; and of all other "lands which were within the compaſs and intent of the ſaid "power; to hold for the term of 99 years, if three perſons "therein named, or any of them ſhould ſo long live; *yielding* "*and paying* therefore during the ſaid term, at and upon the days "and times in that behalf uſed and accuſtomed, *the ſeveral and* "*reſpective old accuſtomed rents reſerved and payable* for the ſaid "ſeveral meſſuages, *&c.* thereby leaſed, according to the intent "of the ſaid proviſo." And he alſo made another leaſe, whereby *part* of the *premiſes*, for which *fines had not been uſually* taken, and of which there was *then* no *leaſe for years*, or *for any life*, in being; to hold for 99 years, if three perſons therein named, or any of them ſhould ſo long live, *yielding* yearly, during the ſaid term, *ſuch ſum and ſums of money* as ſhould amount to the *moſt and beſt improved yearly rent* that could be *reaſonably had* and *obtained* for the ſame. The queſtion was, whether the leaſes were well executed? On the hearing, the latter leaſe was given up by the leſſees, "a "*reſervation of the moſt improved rents, &c.*" being ſo uncertain, that they could not contend in ſupport of it at the bar. And the former, after a hearing before Lord Keeper *Cowper*, aſſiſted by the Lord Chief Juſtice *Holt*, and Lord Chief Juſtice *Trevor*, was held, by the Lord Keeper and *Trevor*, againſt the opinion of *Holt*, not to be warranted by the power, and decreed accordingly. From this decree, after a long acquieſcence under it, an appeal was brought to the houſe of lords, where the objections to the leaſe were, *firſt*, that it ought to have mentioned the *particular rent* reſerved. *Secondly*, that the ancient and accuſtomed rent was thereby reſerved, as well for lands, not anciently leaſed, as for thoſe that were; and that *therefore* it was contrary to the meaning of the power. As to the firſt objection, it was inſiſted, that the leaſe under "*the old and accuſtomed*" rent was void, becauſe, there being many farms, and a great eſtate within this leaſe, ſome let at the ancient rents, and ſome not, it would put inſuperable difficulties upon the remainder-man to recover his rent due for the premiſes compriſed in this leaſe; for, that, in the actions or avowries to be made for the rent, he muſt be ſo lucky as to point out *what was the old rent, for what, and for how much land it was paid, and at what time payable.* And, if a tenant could prove, that a *different* rent was paid for the land, or that any other land

was

was compriſed in the leaſe, or that the rent was formerly paid at any other day, the remainder-man could not recover; but, inſtead of recovering the rent from the tenant, muſt, from time to time, pay him coſts; that the proviſo, directing that the tenant ſhould ſeal a counterpart of every leaſe, ſhewed that the intent of the power was to guard againſt all inconvenience, by reducing *every* circumſtance attending the execution of it to a certainty. And the appeal was diſmiſſed, and the decree complained of affirmed. *Dutcheſs of Hamilton* v. *Mordaunt*, 3 *Bro. Par. Ca.* 248. S. C. by the name of *Orby* v. *Mohun*, *Gilb. Eq. Rep.* 45. *Prec. Ch.* 257. 2 *Vern.* 531. 542. 1 *Eq. Ca. Abr.* 343-5. 3 *Ch. Rep.* 56. 2 *Freem.* 291.

2. A power was reſerved by a ſettlement, to make leaſes of lands anciently demiſed, reſerving 12*s.* for every *Cheſhire* acre. A leaſe was made thereupon of all the lands anciently demiſed, reſerving *all the* rent intended to be reſerved. And, upon a trial in *B. R.* where the tenant was plaintiff, he recovered, notwithſtanding that the reſervation was in ſuch general terms; becauſe, in this caſe, there was an abſolute certainty; for the power provided that at leaſt 12*s.* ſhould be reſerved for every *Cheſhire* acre, and the leaſe referred to the words of the power; and, on this ground, the preſent was diſtinguiſhed from the above ſtated caſe. *Leviſon* v. *Pigot*, 3 *Ch. Rep.* 61—76.

3. Tenant for life, with power to make leaſes, whereupon the old and accuſtomed yearly rent ſhould be reſerved, built a new houſe upon the land, and then made a leaſe for 21 years, reſerving only the ancient rent, *&c.* It was contended, that this could not be ſaid to be the ancient rent, becauſe part of it was iſſuing out of the new houſe. But the court held the rent to be well reſerved. *Read* v. *Naſh*, 1 *Leon*, 147.

4. In the caſe of the *Earl of Cardigan* v. *Montague* (on a decretal order on the Maſter's report), where the Duke of *Montague*, being tenant for life, without impeachment of waſte, had power to leaſe, reſerving the ancient rent where uſually demiſed, and the beſt rent where not uſually demiſed, made twenty-four leaſes. The Maſter's report, as to many of the leaſes which he reported bad, was ſubmitted to. As where ancient covenants "to grind at mills," or "to pay land tax," were not in the new leaſe; and where ſome part, not within the power, was included in the new leaſe. And as to five of them, which the Maſter reported to be good, exceptions were taken. Their validity turned upon this point: The words of the power were "*reſerving ancient and accuſtomed rents, heriots, boons, and ſervices.*" In the former leaſes, the tenants covenanted "to keep in repair." That covenant was omitted in *theſe*. And the Lord Chancellor was of opiuion, that the covenant in queſtion was a boon, and beneficial to the remainder-man; and he held theſe leaſes void for want of it. He ſaid, that he was clear upon the argument; but he took time, becauſe there was no caſe in point. The more he thought of it, the more he was convinced. The principle he reſted upon

was, "*that the eſtate muſt come to the remainder-man in as beneficial a manner as the ancient holders held it.*" *Earl of Cardigan* v. *Montague*, cited 1 *Burr.* 122. 1755.

5. In the caſe of *Goodtitle* v. *Funucan*, ſtated in (A. 3) *ante*, 183, one of the objections to the leaſe aroſe upon the covenants contained in it; by one of which the leſſee covenanted, that ſhe would pay half the land tax, amounting to about 7*l.* 10*s.*; and by another, the leſſor covenanted to free her from tithes, and from levies and payments to the church. Theſe covenants, it was ſaid, were not ſo *beneficial* to the remainder-man, as thoſe in the ancient leaſes; for that, in the former leaſes, the tenants covenanted to pay all duties and taxes, except the land tax; that church dues were, by law, particularly chargeable upon the occupier. Theſe new covenants, therefore, were *leſs beneficial* to the remainder-man than thoſe in the former leaſes. But the court ſaid, that the objection, as to the covenants, was not much relied on; and did not require much conſideration. The power made no mention of covenants. The ground, therefore, muſt be, that the preſent covenants were a *fraud* on the power, by leſſening the value of the reſervation; but, on conſidering them fully, it appeared that what was thrown on the landlord was compenſated by what was paid by the tenant. She was to pay half the land tax. As to the church dues, the covenant ſeemed to be collateral, and not to go with the land, nor to bind the remainder-man, reſembling a covenant for quiet enjoyment. But if it did go with the land, there was no pretence of fraud on the power, the 30*l.* was *bonâ fide* reſerved as an ancient rent. What was ſtipulated with regard to tithes was of no conſequence, ſince none were payable.

6. Deviſe of a meſſuage to *H. E.* with a power to leaſe in poſſeſſion for 21 years, reſerving the beſt and moſt improved yearly rent; and ſo that (amongſt other reſtrictions) in every ſuch leaſe there were contained *uſual and reaſonable* covenants. *H. E.*, purſuant to his power, by indenture, demiſed the premiſes for 21 years at an adequate rent, with a covenant from the leſſee to keep and deliver up the premiſes in tenantable repair (accidents by fire or tempeſt excepted.) The leaſe alſo contained a covenant on the part of *H. E.* that *if the premiſes ſhould be deſtroyed by tempeſt or fire* during the term, then *H. E.* or his aſſigns, or the perſon or perſons for the time being entitled to the freehold and inheritance, his or their heirs or aſſigns, ſhould *repair or rebuild the ſame, or in default thereof ſhould be at liberty to quit the premiſes*, and forthwith be diſcharged from payment of the ſaid yearly rent. The jury found, that this laſt covenant was an unuſual and unheard of covenant on the part of the leſſor. It was contended for the leſſee, that, although the covenant itſelf was bad, yet *that* alone might be rejected, and the leaſe be ſupported in other reſpects. But the court of *B. R.* held the whole leaſe to be void, as not warranted by the power. *Doe* v. *Sandham*, 1 *Durnf. & Eaſt*, 705.

(A. 5) Where the Power is purſued; in reſpect of the *Thing leaſed.* 16 Vin. 473.

1. LANDS were conveyed on a marriage to truſtees, to the uſe of one for life, remainder to his firſt and every other ſon in tail male, &c. with a proviſo, that it ſhould be lawful for tenant for life and the ſeveral other perſons therein mentioned, as they ſhould be in poſſeſſion, and for the truſtees of the ſettlement, during any minority, &c. by any deed, &c. to be ſigned, &c. to demiſe, leaſe, &c. either in poſſeſſion or reverſion, for one life, or for two or three lives, &c. all or any part of the ſaid premiſes, *which had been uſually ſo demiſed and letten*, ſo as there ſhould be no more than three lives in being at one time, &c. A leaſe was after made by indenture, between the truſtees (there being a minority) and *J.* of part of the premiſes, in conſideration of a fine paid, a certain yearly rent, and a ſpecific ſum for a heriot. Several old leaſes of the premiſes in queſtion were ſhewn, ſome in Queen *Elizabeth*'s time, and others in *Henry* the 8th's time, ſome for years abſolute, and others for 99 years determinable on three lives: and, among the reſt, an indenture *tripartite*, bearing date the 15th of *December* 1638, whereby one of the anceſtors of the tenant for life, being ſeiſed in fee, in conſideration of natural love and fatherly affection to his ſecond ſon, and for his better advancement, &c. covenanted to ſtand ſeiſed to the uſe of himſelf for life, then of his ſecond ſon, his executors, &c. for 99 years, if his ſaid ſon, or any woman he ſhould marry, or any iſſue of his body ſhould ſo long live, paying unto the heirs and aſſigns of the father the yearly rent of 4*l.*, with covenants on the part of the ſon to pay the rent and repairs. The queſtion was, whether a covenant to ſtand ſeiſed could be conſidered as an evidence of the uſual manner of demiſing? *Et per curiam*, it ſhall. There was no doubt but that theſe lands had been uſually leaſed for lives, and the uſual profits made by fines. A covenant to ſtand ſeiſed, entered into by the owner of an eſtate, they ſaid *was* a *leaſe*, and the objection, that the covenant to ſtand ſeiſed in queſtion was by way of proviſion for a younger child, was of no weight, for nothing was more common than making thoſe leaſes for the benefit of younger children. *Right* v. *Thomas*, 3 *Burr.* 1441.

2. In the caſe of *Goodtitle* v. *Funucan*, (ſtated in (A. 3) *ſupra*) part of the premiſes conſiſted of manors and manerial rights which had never been letten before, and alſo of a fiſhery that had been letten before, but was not, at the time of the ſettlement. Since that time it had been again letten at 15*s.* And the ſecond point in the caſe was, whether the fiſhery and manors were demiſable under the power. It was contended, the power could not be extended to them. The manors had never been let; the fiſhery was not let at the time of the ſettlement; and the power required the rent *then* paid, or *more*, to be reſerved. Things then,

for

for which *no* rent was *then* paid, could not be meant to be comprehended. *Sed per curiam*, The power was expreſs to demiſe the manors and fiſheries. "They were *particularly mentioned* in "the ſettlement, and the power went to the whole. They paid "under this leaſe as great a yearly rent as at the time of the ſet-"tlement, for they paid nothing then; the words therefore were "complied with, and this objection can only ſtand upon the in-"tent." But the court thought no ſuch intent appeared; the manors were of no value; no object of yearly income. The fiſhery only worth 15*s.* a-year. They were convenient to the leſſee living upon the land, and of no uſe to the remainder-man. The intent they thought was to give leave to demiſe all, reſerving as much rent in the whole as had been paid before. And in fact 30*l.* more had been reſerved.

3. Teſtator deviſed all his manors, lands, tenements, and hereditaments to his wife for life, remainder to truſtees for *W. G.* for life, remainder to *R. G.* for life, remainder to his ſons ſucceſſively in tail male, remainder to *M. G.* for life, remainder over; with power for the perſons to whom the premiſes ſhould, by virtue of the limitations aforeſaid, come and deſcend, by any deed, *&c.* to demiſe, *&c.* all or any of the ſaid manors, parts of manors, meſſuages, lands, tenements, and hereditaments, for one, two, or three lives, or for 99 years determinable on lives, ſo as the *uſual rents* and other yearly payments, dues, *&c.* were reſerved. *R. G.* becoming ſeiſed by the deaths of the widow and *W. G.*, demiſed the tithes mentioned in the next ſtated indenture for 99 years, determinable on two lives. On his death without iſſue *M. G.* became ſeiſed; and, by indenture, demiſed in reverſion to *P.* a moiety of the *tithes of corn and grain* in *St. N.* (part of the premiſes) for 99 years, determinable on a ſingle life, *at the rent of* 19*s.*, payable quarterly, *two capons yearly*, and *a heriot of* 40*s.* on the death of the nominee. At the time of making the will, part of the eſtate deviſed had been uſually demiſed; but *the moiety of the tithes had never been leaſed prior thereto.* *Lens*, againſt the leaſe, contended that the demiſe of the tithes by *M. G.* was not authoriſed by the power; ſince, according to the terms of it, the *uſual rent* was to be reſerved, which in this caſe would not be, the tithes never having been letten before. And he cited, amongſt other caſes, *Baggott* v. *Oughton* (ſtated in 16 *Vin.* 472. *pl.* 1. ſide note) and afterwards, in reply, obſerved that the firſt poſition in the ſame pl. (which ſee) had never been acted upon, or even noticed, in any ſubſequent caſe. And the court of *B. R.* were of opinion, that the intent of the deviſor was to include in the power only what was uſually letten; and therefore the leaſe of the tithes was not warranted by it. *Pomeroy* v. *Partington*, 3 *Durnf. & Eaſt*, 665.

(A. 7) Where the Power is *exceeded*. How it ſhall be. 16 Vin. 473.

Sect. I. Exceſs, in reſpect of the *ſubject-matter* of the Power.

1. LORD *Conway*, having power by a ſingle inſtrument to grant leaſes of his eſtates, granted ſeveral, ſome of which were not within the power; and though they were all within the ſame inſtrument, they were conſidered as ſeveral leaſes, and it was ſent to the Maſter to ſeparate them. Cited in 2 *Veſ.* 645.

2. In the caſe of *Duff* v. *Dalzell*, ſtated in (A. 14) *inf. ſec.* 2. *pl.* 5. where the ſame power extended over both *real and perſonal* eſtate, and was executed by a will to which there was only *two* witneſſes; it was held, that this was *ſufficient* to paſs the *perſonal* eſtate, it being a good execution of the power as to *that*, though void as to the real eſtate.

Sect. II. Exceſs, in reſpect of the *quality* or *quantity* of the *eſtate* or *intereſt* appointed.

1. LORD *Pawlett*, having a power under his marriage ſettlement of diſtributing 30,000*l.*, which was ſettled for his younger children's fortunes, in ſuch ſhares and proportions as he ſhould think fit, appointed 29,900*l.* to his ſon *Ann Pawlett*, *ſubject to the deviſes in his will*, and directed the other 100*l.* to be equally divided amongſt his younger children. Lord *Hardwicke*: "This is void as an appointment; becauſe, where a "father has only a power of apppointing or diſtributing portions, "which are to be raiſed in all events, in ſuch ſhares and proportions as he ſhall think fit, he cannot annex any condition to the "payment of any ſhare which he appoints; and, if ſuch condition "annexed is for the father's own benefit, it will then have the appearance of fraud; therefore this court will look upon ſuch "appointment to be void; otherwiſe it is, where the portions are "not to be raiſed at all without the father's appointment; for "there the father may annex a condition. Where the appointment to a particular child is evaſive and illuſory, this court will "ſet it aſide, and will not allow ſuch inequalities to be made "amongſt children as appear to be unconſcionable." *Pawlett* v. *Pawlett*, 1 *Wilſ.* 224. *a*.

2. If a father, having power to make an appointment to his children, qualifies it by annexing a condition that they ſhall releaſe a debt owing to them, or pay money over, the appointment will be abſolute, and the condition void, the boundaries between the proper execution and the exceſs being preciſe and apparent; but, where the boundaries are not diſtinguiſhable, ſuch an execution will be bad. By Sir *Thomas Clarke*, 2 *Veſ.* 644.

3. Truſt

3. Truſt money being ſettled, after the deceaſe of the wife if ſhe ſurvived the huſband, upon all the children of the marriage, in ſuch ſhares as the huſband ſhould by deed or will appoint; the huſband by will, after appointing conſiderable ſhares to ſome of the children, gave two of the daughters ſmall ſhares only, *on account of what he had before given them in marriage.* Held, theſe latter appointments were not illuſory, for the reaſon which the appointee aſſigned. In *Briſtow* v. *Warde*, 2 *Veſ. jun.* 336. See S. P. in *Bogle* v. *Biſhop of Peterborough*, 1 *ib.* 299. and (A. 16) *pl.* 2. *infra.*

4. By marriage ſettlement 4000*l.* was ſecured, after the death of the huſband and wife, for the children of the marriage, ſave an eldeſt or only ſon, in ſuch proportions, *&c.* as the huſband and wife, or the ſurvivor ſhould appoint, and in default equally, at 21 or marriage. There were four younger children, and at different times 1000*l.* a-piece was appointed to three of them. The fourth attained 21, and died, without having any ſhare appointed in the life-time of his father, who ſurvived his mother. Held, the appointments of the 3000*l.* were not illuſory, although the repreſentative of the deceaſed child took only an equal ſhare with the other younger children of the *unappointed* part. In *Wilſon* v. *Piggott*, 2 *Veſ. jun.* 355.

5. By marriage ſettlement funds were veſted in truſtees for the ſeparate uſe of the wife for life; and, after her deceaſe, to pay the principal and all arrears of intereſt to all and every her child and children in ſuch parts, ſhares, and proportions as ſhe ſhould by will give, *&c.* and for want of ſuch gift, *&c.* to all and every her child and children, part and ſhare alike. The wife, by her will, gave 10 guineas, part of the fund, to her eldeſt ſon, declaring he was otherwiſe provided for; and the remainder to the other children equally, *&c.* The only proviſion for the eldeſt ſon was a remainder in tail after the death of his father, who ſurvived his wife. Held, at the Rolls, that the appointment was illuſory and void, the proviſion for the eldeſt ſon being merely eventual. *Vanderzee* v. *Aclom*, 4 *Veſ. jun.* 771.

See (A. 14) *ſ.* 6. *infra.*

Sect. III. Exceſs, in reſpect of the *appointee*; and where relieved in equity.

1. ON the marriage of *A.* with *B.* a leaſehold eſtate was aſſigned in truſt for *A.* for life, remainder for *B.* for life, remainder for the children of the marriage; with power for *A.* to appoint the whole or any part to any one or more *children* of that marriage, if more than one. There were four children of the marriage; and *A.* by deed, in which his wife joined, in conſideration of 80*l.* to himſelf and 50*l.* to his ſecond ſon, paid by *C.* his eldeſt ſon, appointed the eſtate to truſtees, as to one moiety, for himſelf for life, remainder for *C.* for life; and as to the other, immediately for *C.* for life; remainder, as to the whole, for ſuch *wife*

as

as *C.* ſhould marry for life, remainder to the *iſſue of the body or child or children* of *C.*, remainder over. One of the objections to this appointment was, that the father could only appoint to the children *perſonally*, and not to their wives or iſſue. But Lord *Hardwicke* held it to be good in the preſent caſe, with the conſent of *C.*; for, had it been to *C.* abſolutely, he might directly afterwards have ſettled it in that manner. *That* court, he added, never ſet ſuch appointments aſide. *Langston* v. *Blackmore*, *Ambl.* 289. See S. P. in *Wade* v. *Paget*, (A. 17) *pl.* 5. *poſt.* but this queſtion does not appear to have been at all conteſted there. See however *Brudenell* v. *Elwes*, 1 *Eaſt*, 442. which however was a queſtion at law. See too S. C. 7 *Veſ. jun.* 382. but the fact of the children being parties doth not appear there.

2. Teſtator gave 600*l.* to his wife, to be diſpoſed of amongſt his three daughters *A.*, *B.*, and *C.*, in ſuch proportion, and payable in ſuch manner, as ſhe ſhould think fit to give it in her life, either by will, or by any deed or note in writing, *&c.* The mother, by her will, gave her daughter *B. who was dead*, and to whom ſhe was executrix, 200*l.* as her ſhare of the 600*l.* and died. Lord *Hardwicke* held this appointment to be bad; as the original teſtator intended this as a *perſonal* proviſion for his daughters, and the mother could not have extended it even to the children of any of them, ſtill leſs to an executor, who might be a ſtranger to the family; and he decreed the 200*l.* to the two ſurviving daughters. 1ſt point in *Maddiſon* v. *Andrew*, 1 *Veſ.* 57. See *Burleigh* v. *Pearſon*, *Ib.* 281. *Falkner* v. *Butler*, *Ambl.* 514. and *Earl of Bute* v. *Stewart* (ſtated in Suppl. tit. *Deviſes* (I. 6) *ante.*) *Lord Hinchinbroke* v. *Seymour*, 1 *Bro. Ch. Ca.* 395.

3. Tenant for life, with a power of jointuring, being greatly in debt, married, and by deed before the marriage, made a jointure on his wife to the extent of his power; but a previous agreement was ſigned between them, whereby ſhe was forthwith to join in levying a fine, the uſe of which was to pay her only 20*l.* a-year for her own benefit; 50*l.* a-year was to be applied in payment of his debts, *and then to his wife for her life*; and the reſidue of the profits were to be paid as he ſhould by will appoint, or otherwiſe to go to his executors, adminiſtrators, or aſſigns. No fine was levied; and the huſband died ſoon after the marriage. Eleven days after his death the wife conveyed the eſtate to truſtees, to pay herſelf 20*l.* a-year for life, the overplus of the rents to diſcharge the ſaid debts, and then in truſt for herſelf for life. Lord *Hardwicke* allowed the appointment as far as it reſpected the 20*l.* a-year, but beyond that he rejected it, the tranſaction being a manifeſt fraud on the remainder-man, and avowed by the wife ſince the huſband's death. *Lane* v. *Page*, *Ambl.* 233.

4. *A. B.* deviſed 6000*l.* to truſtees to pay the intereſt to his wife for life, and gave unto his wife, "the abſolute diſpoſal of "the ſame ſum unto and *amongſt ſuch children* begotten between "them, and in ſuch proportion, as ſhe ſhould by laſt will and "teſtament, or other deed or deeds to be executed, *&c.* direct

"and

" and appoint." The mother, there being *then* five of the children living, made her will, and therein recited her power, and, in purſuance thereof, gave to her daughter *Anne*, 100*l.* to be paid out of the ſum of 5390*l.* which ſhe computed to be the only remaining ſum of 6000*l.* after deducting what ſhe had before paid to ſome of her children. And, as to the remaining produce, ſhe diſpoſed thereof to her daughter *M.* and ſon *J.* for their own reſpective uſe, each one equal fourth part thereof, and alſo the other remaining two fourth parts; but, as to theſe laſt two-fourth parts, upon the truſt following, *viz.* as to one of the ſame, *to place out or continue on ſecurities, during the life of their ſiſter, her daughter C. wife of C.*, and to pay the intereſt as ſhe ſhould from time to time direct, *&c.*; and at her deceaſe, to pay the principal *to ſuch child or children*, if any, as ſhe ſhould have living at her deceaſe, as ſhe ſhould by will appoint, and for want, *&c.*, to ſuch child, if but one, if more equally: in default of ſuch children, the principal of ſuch fourth part, if ſhe ſurvived her huſband, to be paid to her, for her only uſe; but if ſhe died in his life, then to go to the ſaid *J.* and *M.*, yet for their own reſpective benefit only; as for one-third part thereof to each of them, and, as to the other third part, and alſo the other of ſuch remaining two-fourth parts, whereof no ſuch diſpoſition was therein then made, upon truſt to pay and apply the principal and intereſt as they ſhould, *in their diſcretion*, think moſt beneficial for the perſonal ſupport and maintenance of their brother, her ſon *F. and his wife and children*, but not for the payment of his debts. It was held, *Firſt*, That the proviſion to *C.* (wife of *T. C.*) for life, in the *fourth part*, was *undoubtedly good*, although the proviſion for the children of *C.* was not a good appointment; becauſe a power to appoint to children would, *in no caſe*, warrant an appointment to grand-children. Next, as to the contingent intereſt to *C.*, if ſhe had no children and ſhe ſurvived her huſband; but, in default thereof, two-thirds to *J.* and *M.*, and the other third to go over with the other fourth to *F.*, the court obſerved, that ſuppoſe *C.* left children at the time of her death, it was impoſſible any of theſe limitations over ſhould take effect; it would fall into the reſidue, becauſe it was no appointment, being only a partial appointment of that fourth, given only to *C.* for life; and they were of opinion that the children, though they could not take themſelves, would yet prevent the limitation over. But, with reſpect to the appointment for the benefit of *F.*, and of his wife and children, the court was of opinion, that this was no proper execution as to *F.* becauſe the wife and children were to have ſomething; and, *ſo far as ſomething was deſigned for them*, it was *bad*; and the *exceſs being unaſcertainable*, there was no poſſibility to diſtinguiſh preciſely *how much* ſhe intended for the mother, and *how much* for the children, ſo that the appointment could not be ſupported, unleſs upon ſome new ground. It then became a queſtion, Whether the execution of the power might not be made good in ſome other way? And it was held by Sir *Thomas Clarke* that it might; for, he ſaid, ſuppoſe the mother,

ther, inſtead of uſing the words ſhe had done, had given the ſhare in queſtion to be applied in ſuch way as ſhould be moſt beneficial for her ſon, his wife and children, *if they ſhould by law be capable*; he ſhould not have doubted, but that, *as the wife and children were not by law capable*, it would have been *abſolute* to *F.* The queſtion then was, Whether there would be any difference between this caſe put, and the principal one? It bore an analogy, he ſaid, to what the diſpoſitions of the mother would have been, if ſhe had given it to a ſon by name, who had never appeared to have had exiſtence, or had never been capable of taking; if it had been given to theſe four *indefinitely*, and *three* were *incapable of taking*, the *fourth* would have had *the whole*, and *muſt* have taken it, as the others were incapable of taking. It fell, *therefore*, within the reaſon of *Humphries* and *Taylor*, where a perſonal eſtate was given by will to two in joint-tenancy; one was outlawed, and therefore the teſtatrix made a codicil, whereby ſhe *adeemed* what was given to *one* of the two; and the queſtion was, Whether the other joint-tenant ſhould take the *whole* or only a *moiety?* And the court held, that he was to take *what the other did not:* for they were to take the whole between them. The mother, in the principal caſe, never deſigned that *this* fourth part ſhould *fall* into the reſidue, and it would be extremely hard that it ſhould. *Then F.* would be entitled to the whole of that. But, as to the ſubſequent reſtraint, that it ſhould be exempted from his debts, there he held, the mother had exceeded the law, as, in the firſt inſtance, ſhe had exceeded her power, by giving to *M.* and *J.* a diſcretionary authority over *F.*'s ſhare, ſince a perſonal confidence cannot be delegated. *Alexander* v. *Alexander*, 2 *Veſ.* 640. See *Lord Spencer* v. *Duke of Marlborough*, (A. 12) See 2 *Pl.* 2. *poſt.*

5. By indenture, dated 3d *Nov.* 1758, and fines levied in purſuance thereof, the undivided moiety of certain eſtates was limited to the uſe of ſuch perſon or perſons, for ſuch eſtate or eſtates, as *A.*, and *B.* his wife, by any deed or writing, to be by them jointly executed in the preſence of two witneſſes, ſhould *from time to time direct and appoint*; and for want, *&c.* to the uſe of their firſt and other ſons ſucceſſively in tail, remainder to the daughters in tail as tenants in common. By deed-poll of 29th *Nov.* 1758, under the hands and ſeals of *A.* and *B.*, and atteſted by two witneſſes, reciting the ſaid power, *A.* and *B.* did direct and appoint the ſaid moiety to *A.* for life, remainder to *B.* for life, remainder to truſtees to preſerve, *&c.* remainder to the children of *A.* by *B.* as they or the ſurvivor ſhould appoint; and, in default of appointment, to all ſuch children living, *&c.* as tenants in common in tail, with croſs remainders, remainder to *A.* and *B.* and the ſurvivor and the heirs of ſuch ſurvivor; with a *power* for *A.* and *B.* jointly, by deed with two witneſſes, *to revoke the above uſes, and to limit any other uſes*, by deed executed in the preſence of two witneſſes. By indenture of 20th *October* 1764, between *C.* and *D.* his wife, (who were entitled to the other moiety of the ſaid eſtates,) of the one part, and *A.* and *B.* of the other part, reciting the firſt but not

the

the ſecond of the above-ſtated deeds, and reciting an agreement dated 24th *September* 1764, between the ſaid parties for a partition of the ſaid eſtates, *C.* and *D.* conveyed their undivided moiety of certain parts (in *C.* and *W.*) of the ſaid eſtates, to ſuch uſes as *A.* and *B.* ſhould, by any deed or writing, from time to time releaſe or appoint; and in default, &c. (as was the caſe) to the uſe of *A.* for life, remainder to *B.* for life, remainder to truſtees to preſerve, &c. remainder *to the children of* A. *by* B., *and for ſuch eſtate and eſtates as they, by deed or writing, under both their hands and ſeals, or as the ſurvivor of them, in caſe of no joint appointment, by any deed or writing, under the hand and ſeal of ſuch ſurvivor, atteſted by two witneſſes*, or as ſuch ſurvivor, by will, ſhould limit and appoint; and if no appointment, to their firſt and other ſons in tail, remainder to their daughters as tenants in tail, remainder to the appointment of *B.*, and for want, &c. to her right heirs. Soon afterwards *A.* died, leaving *B.* his widow, and one ſon (*F.*) and two daughters (*M.* and *C.*) by her. By indenture dated 4th *July* 1767, and duly executed by *B.* in the preſence of and atteſted by two witneſſes, reciting the deeds of the 3d and the 29th of *November* 1758, and the 20th *October* 1764, *B.*, in purſuance of the power reſerved to her by the ſaid ſeveral deeds, directed and appointed the two moieties of the eſtates in (*C.* and *W.*) ſubject to her own life eſtate, and the proviſo after-mentioned, to the uſe of her daughters *M.* and *C.* for 500 years, (redeemable by *F.* her ſon, on payment of 6000*l.*) remainder to *F.* in fee; with a power *to revoke that deed, and to limit the ſame premiſes* between the ſaid children in ſuch manner, &c. as ſhe ſhould think fit. By another indenture, dated 25th *October* 1771, reciting the ſaid ſeveral deeds, *B.*, in purſuance of her ſaid power, granted and appointed the premiſes, ſubject to her own life eſtate, and the proviſo after mentioned, as to one moiety, to the uſe of *M.* her eldeſt daughter for life, remainder to truſtees, &c. remainder to the ſons and daughters of *M.* in the uſual manner in tail; remainder to *C.* her youngeſt daughter, and her iſſue in like manner; remainder to her own right heirs. And, as to the other moiety, to *C.* for life, with limitations over ſimilar to thoſe in the firſt mentioned moiety. In this deed alſo a power was reſerved to *B.* to revoke, and appoint a-new. Upon this caſe three points were made; the firſt of which being irrelevant to the ſubject of the preſent ſection, is ſtated in (I.) *poſt*. The ſecond point was, that, admitting the firſt point already referred to, *B.*, under the words of the power, could appoint to children *only*, and not to grand-children; according to *Alexander* v. *Alexander* (above ſtated). This was conceded by the other ſide, and afterwards reſolved by the court; who, however, ſeparated the *exceſs* from the *due execution*, by holding, that the limitation to the daughters *for life* was good. The queſtion then was, What eſtate *F.* the ſon would take? And it was contended, and afterwards reſolved by the court, that, the inheritance being unappointed, *F.* took an eſtate tail, ſubject to his ſiſters' life eſtates under the deed of 20th *October* 1764; the limitations

limitations of which deed alſo ſeemed agreeable to the intention of the parties in the deed of 3d *November* 1758. *Adams* v. *Adams*, *Cowp.* 651. *Goodtitle* v. *Weale*, 1 *Wilſ.* 369. *b.* and *Doe* v. *Dauny*, (A. 14) *ſect.* 5. *pl.* 2. *poſt.* S. P.

6. Power to *a feme covert* to diſpoſe by deed or will of 1300*l.* *to ſuch of her children, in ſuch manner and form, and to ſuch uſes and purpoſes, as ſhe ſhould appoint.* She gave 400*l.* to *R.* abſolutely, 400*l.* to *B.* at 21. and 500*l.* to *P.*, that is, the intereſt and dividends to *P.* for life, and after her deceaſe, the principal to be divided among her children. Under the very full words of this power, the appointment was held to be well made. *Malliſon* v. *Andrews*, *Chanc. Hil.* 1782. 2 *Bro. Ca. Cha.* 27. note.

7. Lands were deviſed to *A.* for life, remainder to the uſe of ſuch of his child or children, for ſuch eſtates, and in ſuch ſhares and proportions, and ſubject to ſuch powers, proviſions, conditions, *&c.* as he, by deed or will, ſhould appoint; and for want, *&c.* to ſuch children, as tenants in common, in tail, with croſs remainders, *&c.* remainder to *A.* in fee. *A.* having three ſons, *B.* his eldeſt ſon, *C.*, and *D.*, *all of whom were living at the time of the deviſe to him*, made his will, and gave one moiety of the lands to *C.* for life, remainder to truſtees to preſerve *&c.* remainder to his firſt and other ſons in tail male, remainder to *D.* and his iſſue in like manner, remainder to *B.* in fee; and he deviſed the other moiety to *D.* in the ſame manner, and with the ſame limitations over to *C.* and *B.* as the former, *mutatis mutandis*. On the death of *C.* without iſſue, *B.* brought ejectment for *C.*'s moiety, on the ground that the ſubſequent limitations to the ſons were not warranted. The court of *B. R.*, whoſe opinion was delivered by Lord *Manſfield*, inclined to think that the appointment might be good to its full extent; and this, *firſt*, from the ſubject-matter of the power, which was land and a family eſtate; 2dly, from the limitations over for want of appointment; ſince they denoted an intention of the donor of the power to make a ſettlement, although the ſettlement was ſuch, *i. e.* by entail, as could be barred by the iſſue at 21; and had this been repreſented to the donor, ſhe would moſt probably have adopted, in lieu of this defeaſible ſpecies of ſettlement, a diſpoſition in "*ſtrict ſettlement.*" That was meant; but to guard againſt all events, ſhe ſaid, "I will put the father in my "place, and give him authority, if he chuſe to execute it." If the words "*in ſtrict ſettlement*" had been uſed, nobody could have doubted her meaning. 3dly, continued his lordſhip, "Now "all the words in the language, except thoſe, are uſed to carry "this power as far as poſſible, and to ſhew that ſhe meant an "appointment in ſtrict ſettlement. Whatever he might do with "his own eſtate, he might do with this; that was her intention; "only that the children were the objects. What is the uſe of "powers? They imply a ſtrict ſettlement, with power to *make* "*jointures, leaſes, and raiſe portions.*" But the court gave no *judicial* opinion as to this latter point, it being a ſufficient anſwer to

the queſtion then brought on, that, even if thoſe ſubſequent limitations were void, yet the appointment to *D.* for life in remainder, of the moiety in queſtion, was good. *Cavendiſh* v. *Cavendiſh*, cited in 2 *Durnf. & Eaſt*, 245. 4 *Ib.* 741. *et ſeq.* 2 *Bro. C. C.* 25. note S. C.

8. By ſettlement before the marriage of *A.* with *B.* his wife, 20,000*l.* was agreed to be laid out in the purchaſe of lands, to be ſettled to the uſe of *A.* for life, remainder to *B.* for life, remainder to the children of the marraiage, ſubject to ſuch powers, limitations, and proviſoes as *A.*, by deed or will, ſhould appoint; and for default of appointment then, as *B.* ſhould appoint; and in default, *&c.* to the children (in tail, as appears in 2 *Veſ. jun.* 698.), remainder to *A.* in fee. *A.*, being in poſſeſſion of the truſt money, made his will, and thereby gave to the ſurviving truſtee in the ſettlement 10,000*l.*, part thereof to lay out in real eſtate, to be conveyed in truſt for his daughter *M.* (one of the children of the marriage) for her ſeparate uſe, remainder to truſtees to preſerve, *&c.* remainder to *all and every the child and children* of *M.* as tenants in common, with remainder over. The appointment of the truſt property to the children of *M.* being clearly held an exceſs, it was contended, that the whole ſhould be conſidered as unappointed: But Sir *Lloyd Kenyon*, at the Rolls, ſuggeſted whether it might not go *cy pres*, and cited *Chapman* v. *Brown*, 4 *Burr.* 1626. (and ſtated in Suppl. tit. *Deviſe*, (C. b) *pl.* 8. *ante.*) And accordingly it was afterwards declared, that, in order to effectuate the general intention of the teſtator, *M.* ſhould be conſidered to take an eſtate tail in the lands to be purchaſed with the 10,000*l.*, and that ſhe ſhould have the rents to her ſeparate uſe. *Pitt* v. *Jackſon*, 2 *Bro. Ca. Cha.* 51.

But ſee the ſame caſe on a bill of review, by the name of Smith v. Camelford, 2 Veſ. jun. 698. where the point of cy pres was avoided, by holding (agreeably to the caſes in ſec. 4 pl. 1. infra) that whatever was not appointed, or was ill appointed, went as if no appointment had been made; and then the children themſelves, in whoſe favour the doctrine of cy pres had been applied, would take as tenants in tail.

9. The following caſe was referred from Chancery for the opinion of *B. R.* By ſettlement made on the marriage of *A.* with *B.* his wife, lands in *G.* were conveyed to the uſe of truſtees in truſt for *A.* for life, and then to ſecure a jointure rent charge to *B.*, remainder in truſt for *ſuch child or children of* A. *by* B., *and to, for, and upon ſuch eſtate, eſtates, truſts, intents, and purpoſes, and in ſuch proportions as* A., by any deed or deeds, or by his laſt will, to be executed, *&c.* ſhould appoint; and in default of ſuch appointment, and as and when the uſes, *&c.* to be thereby appointed, ſhould reſpectively end and determine, in truſt for the ſons of the marriage ſucceſſively in tail male. There was iſſue of the marriage one ſon *I.* and four daughters. *A.* by his will, deviſed the lands in *G.* and all other his real eſtate, charged with his debts and with annuities to two of his daughters, to truſtees, to the uſe of his ſon *J. for life*, remainder to truſtees to preſerve, remainder to *the ſons of J.* ſucceſſively in tail, remainder to *his daughters* as tenants in common in tail, remainder, as to part of the lands

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at *G.*, to the plaintiff *E.*, one of the four daughters of *A.* in fee; but with power for *J.* to make jointures, charge with portions for younger children, and grant leaſes. Upon *A.*'s death, *J.* ſuffered a recovery of the lands at *G.*, and deviſed them to the defendant, and died without iſſue. A queſtion aroſe upon the effect of the appointment by the will of *A.* For *E.* the daughter, it was contended, that the limitation by that will to the truſtees to preſerve, and to the ſons and daughters of *J.* (who was himſelf an unborn ſon at the creation of the power) being againſt law and void, the eſtate appointed to *E.* took effect immediately upon the death of *J.* And, in oppoſition to the argument afforded by *Pitt* v. *Jackſon* (*pl.* 9. *ſup.* which was cited), that the will ſhould be conſtrued ſo as to give an eſtate tail to *J.*, it was obſerved, that the latter was the caſe of an appointment, not of lands, but of money to be laid out in land, where courts of equity allowed greater latitude of conſtruction; nor did the caſe cited in ſupport of it appear to warrant the decree. But *Buller*, J. in delivering the opinion of the court, ſaid, that the (before ſtated) caſe of *Alexander* v. *Alexander* was a complete authority againſt the argument, that if the intermediate limitations in ſtrict ſettlement to *J.* and his iſſue were void, it ſhould accelerate the plaintiff's remainder in fee; ſince it was there held, that, though the children (of *C.*) could not take, yet they ſhould prevent the limitation over; and he obſerved, that the conſequence of the doctrine contended for on the part of *E.* would, in the preſent caſe, be, that the ſon of *J.*, had he left one, would have been diſinherited. If then, added he, the remainder to *E.* could not be accelerated, it became immaterial whether the appointment to the ſons of *J.* were void or not; ſince, if void, *J.* took an eſtate tail under the ſettlement, if not, he took an eſtate tail under the will, in order to effectuate the general intent of the teſtator. But this he did not deliver his opinion upon. And the court certified, that *E.*, the daughter, did not take any eſtate under the ſettlement or the will. *Robinſon* v. *Hardcaſtle*, 2 *Durnf. & Eaſt*, 241. 781. 2 *Bro. Ca. Cha.* 22. 344. S. C.

10. The following caſe was ſent from Chancery for the opinion of *B. R. A.*, after having made his will, deviſed his eſtate called *V.* by two different codicils, to *B.* his wife for life, with a power to give and deviſe the ſame to any one or more of his child or children by her, in ſuch *manner*, ſhare, and proportion as ſhe ſhould direct and appoint by her will; *but ſo as the ſaid eſtate ſhould not be divided, but tranſmitted whole and entire to his heirs.* And he then deviſed the reverſion of another eſtate, adjoining to *V.*, in the ſame manner; and willed that the two eſtates ſhould *be conſidered as one eſtate, and tranſmitted entire to his family*; and, in default of appointment, he deviſed them to his own right heirs; and died, leaving three ſons and two daughters, who were all living when he made the two codicils. *B.*, the widow, by her will, appointed the eſtate to *G.* the third ſon for life, remainder to truſtees to preſerve, remainder to the *ſons* of *G.* ſucceſſively in tail, remainder to his *daughters* ſucceſſively in tail, with like remainders to *M.* the

eldeſt ſon, and to the three other children and their reſpective iſſue ſucceſſively. *G.* ſurvived his mother, but died an infant, leaving *M.* his heir. The queſtion was, what eſtates the children reſpectively took? The judges differed in opinion. Lord *Kenyon*, Ch. J. and *Groſe* J. certified, that, as the children were the only objects mentioned in the power, they thought it clear that *B.* could not make any other perſon a purchaſer of any intereſt in the property; and thus, the execution in favour of the grandchildren, *as purchaſers*, was not warranted. But, although the appointment could not take effect in the particular manner intended by *B.*, yet, her general intention being that the children of her ſeveral children ſhould take eſtates of inheritance in tail general, on the death of their reſpective parents, they thought that that general intention ſhould be carried into execution, as far as the power given by her huſband would allow; and conſequently, that *G.* and his brothers and ſiſters reſpectively took eſtates in tail general. This conſtruction they thought fairly warranted by great authorities. *Aſhburſt*, J. and *Buller*, J. on the other hand, premiſed their opinion with obſerving, that the intention of the perſon creating the power, which, they ſaid, was the material object to be attended to in the execution of it, was to be collected from the words of the will, or other inſtrument giving the power, according to the ordinary and common, not any legal or technical acceptation. A ſettlement on a child for life, with remainders to his firſt and other ſons in ſtrict ſettlement, is in common parlance a ſettlement on the child; and the general intention of perſons, who look forwards to future ſettlements, is, that the eſtate ſhall be tied up as long as the rules of law will allow. Their certificate then proceeded as follows:—"The queſtion is, whether the words "uſed in this will ſufficiently indicate that intent; and we are "of opinion that they do. If the words 'in ſtrict ſettlement' "had been uſed, the caſe would have admitted of no doubt. "And we think the words 'manner,' 'ſhare,' 'proportion,' and "'tranſmit' are equivalent to them. The wife having a power of "ſettling the eſtate among the children, in ſuch manner as ſhe "thought fit, it is as extenſive as if every manor had been ex"preſsly enumerated, or the teſtator had ſaid 'in ſtrict ſettle"ment or otherwiſe.' Beſides, the word '*tranſmit*,' in our judg"ment, moſt naturally applies to a ſtrict ſettlement, and means, "that the remote deſcendants of the teſtator, as far as the law "allows, ſhould take by the gift of the wife, and not by deſcent. "The word 'children' has been held to be co-extenſive with "iſſue; and to include grand-children and great-grand-children "both in law and equity; as we find in *Wild*'s caſe, 6 *Co. Bendloe*, "30. and 1 *Ventr.* 231. We think that the intention of the teſ"tator in this caſe requires that conſtruction, and that the teſta"tor uſed the term 'children' as denoting the branches ſprung "from him. The expreſſions, that it was his will and intention "'that the eſtate called *V.*, and the other eſtate adjoining, ſhould "be conſidered as one eſtate,' and be 'tranſmitted entire to his

" family,' confirm our opinion. The caſe of the *Duke of Devon-*
" *ſhire* againſt *Cavendiſh* (above ſtated by the name of *Cavendiſh*
" v. *Cavendiſh*,) ſeems to us to be in point: and the language there
" uſed by the court was, that whatever the perſon, to whom the
" power was given, might do with the eſtate if it were his own,
" he might do then, with the exception only that the children
" were the objects. But, ſuppoſing that the eſtate could not,
" under this power, be ſtrictly ſettled on the iſſue of the chil-
" dren, yet we are of opinion, that the eldeſt cannot make a good
" title to the eſtate. There is, *primâ facie*, a contradiction in the
" power, which firſt enables the wife to give to one or more of
" the children in ſuch proportions as ſhe thought fit, and after-
" wards adds the reſtriction, that the eſtate ſhould not be di-
" vided, but tranſmitted whole and entire to his heirs; for if the
" eſtate were always to remain entire, it could not be divided
" into different proportions. The only way of making the dif-
" ferent parts of this power conſiſtent (provided the eſtate cannot
" be limited in ſtrict ſettlement) is to conſider the word 'heirs'
" as applicable only to more remote deſcendants than the chil-
" dren, and to confine the wife's power of appointment to the
" children during their lives only; in which caſe, whatever ap-
" pointments the wife might make amongſt the children during
" their lives, the eſtate, after their deaths, would go entire to the
" right heir of the teſtator. If the teſtator delegated this power
" to the wife, merely to ſecure the obedience of the children
" to her, this conſtruction will anſwer the end. In either way,
" we are of opinion, that *G.* takes only an eſtate for life in poſ-
" ſeſſion." *Griffith* v. *Harriſon*, 4 *Durnf. & Eaſt*, 737.

11. By marriage articles, certain monies were agreed to be veſted in truſtees for the huſband during the joint lives of himſelf and the wife, and if he ſhould die firſt, leaving iſſue by her, for her during her life, and, after her deceaſe, to apply the capital as he ſhould appoint, and in default of appointment, to be divided equally among the iſſue at 21, with power for the truſtees with conſent, *&c.* to lay out the truſt money in lands, ſubject to the ſame truſts. After the marriage, an eſtate was purchaſed with the truſt fund, and ſettled upon the huſband, for the joint lives of himſelf and his wife, remainder to truſtees to preſerve, *&c.* remainder, in caſe he died firſt without iſſue, to certain uſes; but if he died firſt, leaving any child or children, then to the wife for life, remainder to all the child or children, in ſuch ſhares (if more than one) as the huſband ſhould appoint, and for want of appointment, equally in tail, with croſs remainders between them; remainder to the right heirs of the huſband. The eſtate was afterwards ſold, and the produce inveſted in bank annuities. The huſband by his will appointed part of theſe annuities to his ſon for his life, and then to the children of his ſon as the ſon ſhould appoint; and made ſimilar diſpoſitions of other parts in favour of his other children and their iſſue. The appointments to the children being void as exceeding the power, Lord *Loughborough*

held, they could not be remedied by giving the children themſelves eſtates tail, under the doctrine of *cy pres*, as in *Pitt* and *Jackſon*, (*pl.* 8. *ſup.*) even ſuppoſing it a clear authority. There the appointment was to *M.* for life, remainder in tail to her children as purchaſers; ſhe being entitled under the ſettlement to a veſted eſtate tail, ſubject to be deveſted by the appointment. There was not therefore the difficulty which was in the principal caſe in conſtruing that he reduced her intereſt, that her children might take eſtates tail by purchaſe; and that might be executed *cy pres, by letting the eſtate tail ſhe had exiſt*, ſo as to carry over the benefit to her children. Here was a power to the ſon to appoint to children in ſuch ſhares as he thought fit. No eſtate tail was given; but the children would take, either by the appointment, or for want of it, diſtributively *per capita*. But his Lordſhip held, that the appointment was void for the exceſs only; and what was ill appointed went as in default of appointment. *Briſtowe* v. *Warde*, 2 *Veſ. jun.* 336.

12. Perſonalty ſettled on marriage for the huſband for life, then for the wife for life, then for all and every the children and grand-children of the marriage, in ſuch ſhares, under ſuch reſtrictions, at ſuch times, &c. as they or the ſurvivor ſhould appoint. The ſurviving parent by deed, on the marriage of one of the daughters, appointed part to truſtees for the daughter's huſband for life, then for the daughter for life, and afterwards for the children of the marriage. The ſame parent afterwards, by will, appointed other part for the ſeparate uſe of another daughter for life, then for *all and every* the child and children of the ſame daughter equally. She by ſuch will alſo appointed the reſidue to a ſon of the marriage for life, and then for *all and every* his children equally. The appointment on the firſt daughter's marriage was held good, on the ground of an implied agreement; it being juſt as if it were appointed to her, and ſhe had ſettled it ſo with her huſband; though, if it had been done by will, and independent of any modification of the daughter, it would not have held. But the appointments by will to the children of the ſecond daughter, and of the ſon being general, and not confined to thoſe who ſhould be in *eſſe* at the appointor's death were held wholly void, even as to thoſe children who might afterwards be born in her lifetime. And the doctrine of *cy pres* was here again held inapplicable to perſonalty; the court obſerving that, if the parent appointee were declared entitled abſolutely, then his children would not (as in the caſe of land entailed) ſucceed in any manner intended by the appointor; but it would go to his executor, and be liable to his debts. *Routledge* v. *Dorrill*, 2 *Veſ. jun.* 357.

Sect. IV. Where exceeded. *How* it ſhall be. [*i. e.* what ſhall be the Conſequences of the Exceſs.]

1. WHERE part of property ſubject to an appointment is ill appointed, it ſhall go as the whole would have done in caſe of no appointment. In *Briſtowe* v. *Warde*, 2 *Veſ. jun.* 336. and ſtated *ſec.* 3. *pl.* 11. *ſub.* So in *Wilſon* v. *Piggott*, 2 *Veſ. jun.* 355. and ſtated *ſec.* 2. *pl.* 5. *ſup.* *Routledge* v. *Dorril*, 2 *Veſ. jun.* 357. and ſtated *ſec.* 3. *pl.* 12. *ſup.* and *Smith* v. *Camelford*, *Ib.* 698. and ſtated in ſide note *pl.* 8. *ſup.*

2. And where a prior appointment is void as to children unborn at the creation of the power; but a ſubſequent appointment is within the power, the latter ſhall not be accelerated by the avoidance of the power, the intent being that it ſhall not take effect until the prior objects have failed. In *Robinſon* v. *Hardcaſtle*, 2 *Term Rep.* 241. and ſtated *ſec.* 3. *pl.* 9. *ſup.* So in *Routledge* v. *Dorril*, 2 *Veſ. jun.* 363. And therefore where the ulterior appointment is to take effect beyond the limits allowed by law, as after an indefinite failure of iſſue, it is neceſſarily void. *ut ſup.*

3. But where, after a void appointment in the firſt inſtance, the ulterior object is within the power, and alſo to take within a due period, there the latter appointment will have effect at the preſcribed time. As where, under a power in a ſettlement to appoint to children of the appointor, an appointment was, to a ſon for life, and then in truſt for ſuch wife and children or child as he might leave behind him; but if he ſhould *die without leaving a wife or a child him ſurviving*, then in truſt for a daughter of the appointor. Although the appointment to the children of the ſon was bad, yet it was held the ſubſequent gift ſhould take effect, on the happening of the events expreſſed. There is, (ſaid the court) an alternative; if the ſon leaves no wife or child at his death, then the limitation over, being to a good object, ſhall take effect; if he does leave a wife and child, then it cannot take effect. *Crompe* v. *Barrow*, 4 *Veſ. jun.* 681. See Supl. tit. *Deviſe ante*, (F. e) *ſec.* 1. *n.* 2. *paſſim.*

(A. 12) What is a good or void Power to charge [or otherwiſe to diſpoſe of] Lands.

Sect. I. With reſpect to the Inſtrument by which the Power is raiſed.

1. ON the marriage of *A.* with *B.*, who was then a widow, and ſeiſed of an eſtate in fee, articles were entered into, by which *A.* covenanted, that *B.* ſhould have power, by deed or will, to diſpoſe of her eſtate, after her deceaſe, to any perſon what-

ſoever; and that he would do any act to confirm the ſame. After marriage, the wife, by leaſe and releaſe, reciting the articles, conveyed her eſtate to truſtees, after her death, to the uſe of her natural ſon for life, with remainders over. Afterwards the huſband and wife levied a fine of the premiſes, and declared uſes thereof different from thoſe of the releaſe. Lord *Northington* held, that the wife having the legal intereſt in her, the leaſe and releaſe were not good to paſs her eſtate, either as a conveyance or as an execution of a power; and that the eſtate paſſed by the fine. *Bramhall* v. *Hall*, *Ambl.* 467.

2. Previouſly to the marriage of *A. B.* with *C. D.* his wife, who was entitled by deſcent to the inheritance in fee in remainder of the moiety of a *truſt eſtate*, articles were entered into between *A. B.* of the firſt part, *C D.* of the ſecond part, and truſtees of the third part, whereby it was agreed, that certain eſtates, which *C. D.* was then entitled to in poſſeſſion, and all ſuch eſtates either real or perſonal, which ſhould or might *deſcend upon or come to her* during her coverture, or to her huſband in her right, ſhould be to her ſeparate uſe, and to be diſpoſed of as ſhe ſhould by deed or will, *&c.* appoint. And *A. B.*, the huſband, covenanted to do all proper acts for veſting ſuch eſtates in *C. D.*'s appointees accordingly. The moiety of the truſt eſtate afterwards fell into poſſeſſion, and then *C. D.* made her will, and thereby, after noticing the articles, deviſed her ſaid moiety to her huſband for life, remainder (ſubject to a 500 years term,) to her children by him and their iſſue, in the uſual courſe of ſettlement. It was objected, that the power was not well raiſed by the articles, and that *C. D.* could only have done it by *new-modelling her intereſt*. But Lord Ch. *Northington* ſaid, that ſhe muſt have effected this by way of grant, the legal eſtate being in truſtees; and that ſuch a grant would only have operated by way of declaration of truſt, which he thought the articles themſelves amounted to. Many inſtances, his lordſhip obſerved, occurred where the court would not aſſiſt a defective inſtrument, againſt the heir, unleſs there was a meritorious conveyance. In the (above ſtated) caſe of *Bramhall* v. *Hall*, he was of opinion, there was no meritorious conveyance. Here the proviſion was for children, and meritorious. And he held, that the articles were a good reſervation of the eſtate, and that the will was a good appointment of it. *Wright* v. *Engleſield*, *Ambl.* 468. And this decree was afterwards affirmed in the Houſe of Lords. *Wright* v. *Cadogan*, 6 *Bro. Parl. Ca.* 156. S. C.

3. Previouſly to the marriage of *A. B.* with *C. D.* his wife, who was ſeiſed of a freehold eſtate, a bond was entered into by the former, with a condition, empowering *C. D.* to diſpoſe of her freehold eſtate, by deed or will, notwithſtanding her coverture. No ſettlement appeared to have been made on the occaſion, nor any other tranſaction to have paſſed but the bond. The wife, afterwards, by her will, gave her eſtate to her younger children in fee. On a queſtion, Whether the power was well reſerved? a diſtinction was taken between the preſent and the laſt ſtated caſe.

There,

There, it was ſaid, the *legal* eſtate was in truſtees; but in this, it remained in the wife; and it was argued that, whatever might have been the caſe, if the wife had made a diſpoſition for a valuable conſideration, yet, this being a queſtion between volunteers, the court would not interfere. But Lord *Camden* ſaid, it was a miſtake to call it a queſtion between *volunteers*; the agreement was on marriage; and the wife might have compelled the huſband to join her in a fine. And though the two caſes differed, in reſpect that the wife had only the *equitable* intereſt in the one, and the *legal* intereſt in the other, yet the principle of the determination was the ſame in both; and he decreed a conveyance to the younger children. *Rippon* v. *Douding*, *Ambl.* 565.

4. Previouſly to the marriage of *A.* with *B.* his wife, who was entitled to a reverſionary eſtate in fee, *B.* ſigned a paper writing, *without ſeal or ſtamp*, which ſtated, that it was agreed that *B.*'s fortune ſhould be ſettled or remain to their joint uſe for her life, or the life of the longeſt liver; and if, (in the event, which happened,) *B.* ſhould die firſt, *then the aforeſaid fortune to be at her own diſpoſal*; and it was agreed, that proper ſettlement deeds to this effect ſhould be prepared, as ſoon as it could conveniently be done. A duplicate of this paper, *without ſeal or ſtamp*, was ſigned by *A.* On the ſame day and year *B.* made her will, and after certain ſpecific deviſes, gave the reſidue of her eſtate and effects to *A.* The marriage took effect, and *B.* died in the lifetime of *A.* The court of *B. R.* would not permit a title of ſo doubtful equity as they thought that of a claimant under *B.*'s will was, to be ſet up in defence to an ejectment brought by her heir at law; ſince there was no colour for ſaying the articles gave any legal title. In *Doe* v. *Staples*, 2 *Durnf. & Eaſt*, 684.

Sect. II. With reſpect to the *Act* authoriſed by the Power.

1. TESTATOR deviſed lands to his ſiſter and her heirs; but willed, that ſhe ſhould in ſix months after his death, by ſome writing or good aſſurance, ſettle her eſtate on his brother for life, and on her ſiſter *E.* for her widowhood, if ſhe ſurvived her huſband, and after their deceaſe, on any other perſon or perſons *for their ſeveral lives*, who were or ſhould be deſcended from the teſtator's mother, as her ſaid ſiſter ſhould think fit and appoint; and that ſhe might, at any time during her life, make void any appointment, and nominate any new perſon to receive ſuch profit out of her eſtate, provided it were to the deſcendants of his mother, *becauſe it was his deſire, that his eſtates ſhould continue to perſons always deſcended from his mother*; and for that purpoſe, he adviſed, that a writing might be made to truſtees for 99 years, to the uſes aforeſaid. The ſiſter, after the teſtator's death, appointed, but with power of revocation, which ſhe afterwards exerciſed. She then limited the lands to truſtees, to permit *A. B.* a deſcendant of the mother, to receive the rents during his life, remainder to his ſons ſucceſſively in tail male; and in the ſame manner to other

other deſcendants of the mother; remainder to the right heirs of the brother. The general queſtion was, Whether the ſiſter had power, by the will, to diſpoſe of the inheritance; and if ſhe had, whether it was properly exerciſed? Lord *Hardwicke* thought, that the teſtator intended a ſucceſſion of freeholds to deſcendants of the mother; but, in order to effectuate this, the ſiſter muſt have a power of limiting the inheritance; and he cited *Humberſtone* v. *Humberſtone*, ſtated in 16 *Vin.* 333. and reported in 1 *P. Wms.* 333. He was therefore of opinion, that the teſtator intended eſtates for life to all the deſcendants *in eſſe* at his death; (but to theſe his lordſhip could not add thoſe who come *in eſſe* afterwards;) then the remainder to the *heirs of the body* of the teſtator's mother, remainder or reverſion in fee to the right heirs of the *teſtator*, (not of the mother.) *Godolphin* v. *Godolphin*, 1 *Veſ.* 21.

2. Eſtates were deviſed to truſtees, to the uſe of ſeveral perſons ſucceſſively for life, remainder to truſtees to preſerve, *&c.* remainder to their reſpective firſt and other ſons ſucceſſively in *tail male*; but, with power for the truſtees, on the birth of every ſon of each tenant for life, to revoke the uſes before limited to their reſpective ſons in tail male, and to limit the eſtates to ſuch ſons *for their reſpective lives*, with immediate remainders to the *reſpective ſons* of ſuch ſons in tail male. Lord *Hardwicke* was of opinion, that this clauſe of revocation and re-ſettlement was againſt law and void, as tending to a perpetuity, and repugnant to the eſtate limited. And this decree, upon appeal to the Houſe of Lords, after the judges had delivered their unanimous opinion againſt the legality of the clauſe, was confirmed. *Lord Spencer* v. *Duke of Marlborough*, 5 *Bro. Par. Ca.* 592. *Hucks* v. *Hucks*, 2 *Veſ.* 568. S. P.

(A. 14) Where it is well executed; *as to the Manner.*

Sect. I. With reſpect to *the Nature of the Inſtrument.*

1. ONE made a feoffment, with power of revocation by *writing*, ſealed and delivered, in the preſence of three witneſſes, and that he might limit new uſes upon the revocation, and that the feoffees ſhould be ſeiſed to ſuch uſes. Afterwards he deviſed theſe lands by his will, ſealed, and publiſhed in the preſence of three witneſſes. This was held to be a good revocation. *Hubbard*'s caſe, *Hil.* 17 *Jac.* cited *Lit. Rep.* 218.

2. *E.* a feme covert and *F.* her huſband, by deed and fine, conveyed ſeveral eſtates, the property of *E.*, in *C.*, *L.*, and *M.*, to the following uſes; *viz.* as to the eſtates in *C.* and *L.*, except as therein mentioned, and certain parts of the eſtates in *M.*, to the uſe of *F.* for life, remainder to *E.* and her iſſue in ſtrict ſettlement; and as to the reſidue of the eſtates in *M.*, and all other the eſtates of which no uſe was before limited, to the uſe of truſtees, upon truſt, by ſale or mortgage, to raiſe ſuch ſum of money

money as *F.* and *E.*, or the ſurvivor of them, ſhould, by any writing under their hands and ſeals, or under the hand and ſeal of the ſurvivor of them, atteſted by two or more credible witneſſes, direct or appoint; and then, to convey to *F.* for life, and, after his deceaſe, to ſuch perſon or perſons, and for ſuch eſtate and eſtates, *&c.* as *E.* ſhould, by any *writing* under her hand and ſeal, *&c.* direct, limit, or appoint; and, for want, *&c.* to herſelf in fee. And in the deed was contained a proviſo, that, if there ſhould be no iſſue by *F.* on the body of *E.*, or, being ſuch, all of them ſhould die in the lifetime of *E.*, then it ſhould be lawful for *E.* by *any writing* under her hand and ſeal, atteſted by *two* or more credible witneſſes, (notwithſtanding her coverture, *&c.*) to revoke, alter, change, or make void all or any the uſe or uſes, *&c.* therein contained, except the eſtate for life limited to *F.*, and except ſuch eſtates as ſhould be ſold or mortgaged for raiſing money, as aforeſaid; and, "*by the ſame*," or "*any other deed*," to grant, limit, and appoint the ſame premiſes, to any perſon or perſons, for ſuch uſe and uſes, *&c.* as ſhe ſhould think fit, direct, or appoint. Afterwards *E.* not having any children living, *made her will in writing*, under her hand and ſeal, in the preſence of three witneſſes, and thereby, without taking notice of the ſettlement of 1726, ſhe deviſed all her eſtates which deſcended to her, and in which ſhe or her huſband, in her right, or any other perſon in truſt for her, then had any eſtate, ſubject as therein mentioned, to her huſband and his heirs. A queſtion aroſe, whether *E.* had properly executed the power of revocation by her will? In ſupport of the affirmative it was argued, that the *will* was a *writing* under the hand and ſeal of the appointor, atteſted by three witneſſes, and *ſubſtantially* as well as *literally* anſwered the deſcription, and compriſed all the requiſites of the power. That, to give a contrary interpretation to the power, by reaſon of the latter words, "*by the ſame or any other deed*," would be to contradict the former part of it, which enabled *E.* to revoke the uſe by *any writing*; and it was accordingly decreed, that the power was well executed. *Roſcommon* v. *Foulkes*, 4 *Bro. Parl. Ca.* 523. A queſtion was raiſed as to the validity of an appointment under a power, given to a *huſband* and *wife* and *the ſurvivor*, over a reverſionary intereſt, *after their death*, to be executed by any *writing* under hand and ſeal in the preſence of two witneſſes. The wife, after the huſband's death, married again, and, during coverture, appointed by will under hand, *&c.* It was objected, that a writing, *in form of a will*, was a defective inſtrument *here*; for it was not intended to be executed by will, but by ſome inſtrument to take effect in the *lifetime* of the party, becauſe *to be executed jointly*: and then, when it was to be executed by the ſurvivor, it ought to be done by the ſame kind of inſtrument. *Sed per* Lord Chancellor—"There are ſeveral caſes, "where, when a power was reſerved to be executed *as here*, a "will, purſuing the requiſites of the power, has been held a "*writing* within *that power*; nor could it be intended, in this caſe, "that the inſtrument ſhould take effect in the life of the parties,

"it

" *it being over the reverſionary intereſt.* Suppoſe by an inſtrument " not in the form of a will, ſhe had appointed *expreſsly* after her " death; it would have been good. *Then* it was no objection, " that ſhe had done it by an *inſtrument*, which ſpake, *that it was* " *to take effect after her death*; and the *gift* appeared to be the " *ſubject* of the power." *Burnett* v. *Man*, 1 *Veſ.* 157.

3. Lands were limited by *A.* and *B.* (father and ſon) to the uſe of *A.* for life, remainder, ſubject to a jointure rent-charge, to the uſe of ſuch perſon or perſons, and for ſuch eſtate and eſtates, *&c.* as *A.* and *B.* by any of their " *deed or deeds*," (either with or without power of revocation,) to be by both of them ſealed and delivered in the preſence of two or more credible witneſſes, ſhould from time to time jointly grant, direct, limit, or appoint. And, in caſe of the death of either of them, then as the ſurvivor of them by any " *deed* or *deeds*," to be executed as aforeſaid, ſhould from time to time alone grant, direct, limit, or appoint; and in default of ſuch appointment, to the uſes therein mentioned. *B.* died in the lifetime of *A.*, who afterwards, by his will, gave part of the premiſes to his brother in ſtrict ſettlement. It was held in *B. R.* that the power was not duly executed by the will; Lord *Mansfield*, in delivering the opinion of the court, obſerving, that there were no words to lay hold of, upon the conſtruction of which it might be ſupported; for the *firſt requiſite* which the power impoſed was *not poſſible* to be performed by will; which was, that it ſhould be by *joint deed* of *A.* and *B.* Now there could not be a *joint will.* It was true, he ſaid, the ſurvivor had the ſame power; but *then* it was " *emphatically*" reſerved to be executed by " *deed.*" Now the word *deed* had a technical ſignification, to which a will was in no reſpect applicable. If any words had been thrown in, ſuch as *writing*, *inſtrument*, or other term of a general comprehenſive meaning, it might have been fair to have taken advantage of it, in favour of the intention. But *here* were no ſuch general words; and the intention of the perſon who created the power could not properly be fulfilled, unleſs the *form* was *ſtrictly* purſued. *Earl of Darlington* v. *Pulteney*, *Comp.* 260. See *Bramhall* v. *Hall*, ſtated in (A. 12.) *ſupra* 1. *pl.* 1.

And, when a power of appointment of perſonal property is executed by will, ſuch will muſt be regularly proved; as, where a feme covert, having a power to appoint perſonal eſtate by will, left a teſtamentary paper, which, it was contended, was an execution. This paper was not proved in the eccleſiaſtical court; but this, it was argued, was unneceſſary, ſince it was only the writing of a feme covert executing a power, and not ſtrictly a will, her huſband not conſenting to it. Lord Hardwicke, however, was of opinion, that though in notion of law a wife could not make a will, yet, when ſhe had a ſeparate power over her eſtate, and might diſpoſe of it by will, what ever ſort of writing ſhe left ought to be firſt proved in the ſpiritual court, which will not give probate of the will, but adminiſtration with the will, as a teſtamentary paper, annexed. Roſs v. Ewer, 3 Atk. 156. Stone v. Forſyth, Dougl. 707. Colhay v. Sydenham, 2 Bro. Ca. Cha. 519. S. P. And an inſtrument made in execution of a power, either *coupled with an intereſt*, or a *mere naked* authority, retains all its uſual properties; ſo that, if an appointment be made in execution of ſuch power, by *will* (of the eſſence of which ſpecies of conveyance it is, to be ambulatory and incomplete till the death of the teſtator) and the appointee die *before* the appointor, the appointment will not take effect; but the property will lapſe as undiſpoſed of: and this was determined in the caſes of Oke v. Heath, and Duke of Marlborough v. Lord Godolphin, both ſtated in Supp. tit. Deviſe (Y. e) ante. See alſo Lawrence v. Wallis, Ib. (R. 6)

Sect. II. With reſpect to the *Formalities* in the *Execution* of the Inſtrument.

1. LANDS were conveyed to certain uſes, with a power for the ſettlor to revoke thoſe uſes, by any deed or writing, to be executed in the preſence of *ſix* or more credible witneſſes, three whereof were to be peers of the realm. The ſettlor afterwards made another will, atteſted by *three* witneſſes, none of whom were peers, whereby he revoked this ſettlement, and thereby gave a great part of his eſtate to *M.* On behalf of *M.* it was inſiſted, that, although this might not be a revocation in ſtrictneſs of law, by reaſon the circumſtances were not purſued, either in the *number* or *quality* of the witneſſes, yet, as this will was made with great deliberation, (it being in proof, that the draft was not completed until ſix months after inſtructions given for it, and that Lord Ch. J. *Pollexfen*'s opinion was taken upon it,) this will ought to be an effectual revocation in equity, for, the circumſtances preſcribed were *only* to prevent ſurpriſe, and it was evident that there was none in this caſe. But it was held, that the will was no revocation of the ſettlement, either in law or equity; for, in all caſes of ſettlements and revocations, *merely voluntary*, every circumſtance ought to be purſued. *Ducheſs of Albemarle* v. *Earl of Bath*, 2 *Freem.* 193. 3 *Ca. Ch.* 55. See S. C. ſtated in 16 *Vin.* 497. *pl.* 4. and ſide note. *Attorney-General* v. *Thruxton*, ſtated in 8 *Vin.* 479. *pl.* 17. 2d point in *Sargeſon* v. *Sealy*, ſtated in (A. 17) *poſt.* and *Godwin* v. *Kilſha*, *Amb.* 684. S. P.

2. *T.* made a ſettlement *of lands* to the uſe of himſelf for life, and afterwards to ſuch child or children, and for ſuch eſtate, or eſtates, as he ſhould by any writing under his hand and ſeal, teſtified by *two* credible witneſſes, limit and appoint. He, afterwards, made a will, which was executed in the preſence of *two* witneſſes *only*. And the queſtion was, Whether this, being void by the ſtatute of frauds as a will, ſhould nevertheleſs be good as a declaration of truſt, and an execution of the power? And it was *decreed* to be a *good* execution of the power: for, though it was not effectual in all points, (as it was intended,) *as a will*, yet it was a *writing*, which had all the circumſtances required by the power. *Denn* v. *Thwaites*, cited 3 *Ch. Ca.* 69. 2 *Vern.* 80. S. C. but on another point.

3. A ſum of money to which *A.* was entitled, was veſted, previous to her marriage, in truſtees, upon certain truſts; and, in caſe of no children living at the death of *A.*, ſhe dying in the life-time of her huſband, then to be for ſuch uſes, *&c.* as *A.* ſhould, by her *laſt will and teſtament* in writing, or other writing under *her hand and ſeal*, to be *atteſted* by *two* or more credible witneſſes, notwithſtanding her intended coverture, limit, *&c.* Afterwards *A.* died, living her huſband; and, on the day ſhe died, a paper in her hand-writing was found in her cloſet, but not ſigned by her, nor atteſted by witneſſes, the tenor of which was as follows, *viz.* "I

"declare

" declare this my will. To ſiſter *Elizabeth Taylor* 100*l.* To " ſiſter *Sarah Roſs* 100*l.* To my ſon *Alexander Roſs* 400*l.*" And containing in like manner legacies to ſeveral other perſons to the amount of 1240*l.* The queſtion was, Whether this *memorandum* was a ſufficient appointment within the power? And this queſtion Lord *Hardwicke* reſolved into another, Whether this being taken as a *will* or *paper-writing*, the ſolemnity of *ſealing* and *atteſting* were neceſſary to both? He was of opinion, that the latter words in the clauſe, *under her hand and ſeal*, &c. were referable *as well* to the *will* as to the *other writing*. That, " *then* " in truſt to transfer the moiety unto ſuch perſon, &c. as the " ſaid *Ann* ſhould in and by her laſt will and teſtament in writing, " *or* other writing under her hand and ſeal to be atteſted, &c. " limit, appoint, and declare," &c. was one entire ſentence; and, being ſo, the words were naturally referable to both. Therefore the obſervations which had been made on the word " or" being a diſjunctive, were not material in this caſe. The meaning of framing it in this manner was, to give *A.* a greater latitude than the words *will in writing* only would have done. And his lordſhip thought the caſe of *Dormer* v. *Thurland*, (ſtated in 16 *Vin.* 484. *pl.* 19.) much ſtronger than the preſent one. And he held, that the power was not well executed. *Roſs* v. *Ewer*, 3 *Atk.* 156.

4. On the marriage of *C.*, an eſtate was ſettled upon himſelf for life, with remainders over in the common form. Articles were entered into, when *J.* the eldeſt ſon, and *T.* the younger ſon of *C.* came of age, reciting the ſettlement, and that, whereas there was thereby no proviſion for younger children, though ſeveral were then living; to the intent therefore that 300*l.* might be raiſed, *C.* the father, *J.* and *T.* had taken it into conſideration, and *agreed*, that 300*l.* ſhould be raiſed upon the eſtates, immediately after the death of *C.*, and to be paid to ſuch younger children in *ſuch manner and form* as he ſhould, by his laſt will *duly executed*, direct and appoint; and in order to have the ſame effectually done and aſſured, the *two ſons* did covenant, that, after the father's death, any part might be granted, mortgaged, &c. for raiſing the 300*l.* to be paid as the *laſt will and teſtament* of *C.* ſhould *direct* and *appoint*. The father, by will, atteſted only by *two* witneſſes, particularly diſtributed this 300*l.* It was contended, that this proviſion could not take effect, as there was not a proper execution of the power; the will not being ſuch as would paſs lands *according to the ſtatute of frauds*, all the requiſites of which, it was argued, were called for by theſe articles; for, the addition of the word " *duly*" was tantamount to " *legally:*" and *Wagſtaff* v. *Wagſtaff*, (ſtated in 8 *Vin.* 129. *pl.* 5.) and *Langford* v. *Eyre*, (ſtated in 16 *Vin.* 479. *pl.* 11. ſide note,) were cited. But it was obſerved by the court, that this was the diſpoſition of the ſons, and not of the father, who was only referred to as a proper perſon to apportion the ſums, and paſſed no intereſt in the lands from *himſelf*. He therefore ſtood in the ſame ſituation as a mere ſtranger; and, if one ſhould charge

charge his eſtate with a ſum, to be divided as a mere ſtranger ſhould think proper by will, the neceſſity of its being a will conformable to the ſtatute did not occur. And the court was of opinion, that the power was well executed. *Jones* v. *Clough*, 2 *Veſ.* 365.

5. *D.*, by will, had given ſeveral ſhares in the *Sun Fire Office* to *F.* his daughter, and after his deceaſe, to ſuch perſons as ſhe, by her will, ſhould direct; and he had alſo deviſed real and perſonal eſtates in *Jamaica*, in moieties, the one moiety to *F.* for life, and, after her deceaſe, to ſuch perſon as ſhe by will ſhould direct; the other moiety to *R.* in like manner. *F.*, by her will, reciting that of her father, diſpoſed of the *Sun Fire* ſhares, and alſo of the real eſtate; but the will was not executed to paſs real eſtate, there being *two* witneſſes only to it. It was contended, that, where the power was to be executed by will, it muſt be ſuch an one as would paſs the property that was the ſubject thereof; and therefore, as land as well as perſonalty was the ſubject on which this power was to attach, the teſtator, meaning to give a power over both, muſt have intended that the inſtrument ſhould be ſuch as would diſpoſe of the real eſtate as well as the perſonal. *Sed per curiam*—The will, being ſufficient to paſs the perſonal eſtate, was, ſo *far*, a good execution of the power. *Duff* v. *Dalzell*, 1 *Bro. Ca. Cha.* 147.

6. By marriage ſettlement, 300*l.* *New South Sea* annuities was agreed to be transferred to truſtees, for ſuch uſes as *A. B.* (a married woman,) by any writing or writings under her hand and ſeal, atteſted by two or more credible witneſſes; or by her laſt will and teſtament, to be by her ſigned, *ſealed*, and publiſhed in the preſence of the like number of witneſſes, ſhould appoint. *A. B.* made two teſtamentary papers, the one of them beginning: "This I deſire may be done as my laſt will and teſtament." Wherein, amongſt other things, ſhe ſaid, "I bewill to my huſ-"band the ſum of 300*l.*, my new joint ſtock annuities for his "own uſe." This was written on unſtamped paper, and was only *ſigned* by the teſtatrix. She afterwards, on the ſame day, made the following teſtamentary writing upon *ſtamped* paper: "This is my laſt will and teſtament, at my death, for my huſband to bewill "to him the ſum of 300*l.*, which is now in the joint ſtock an-"nuities, for his own uſe." The teſtatrix, *having fixed the two papers together with a wafer*, requeſted two witneſſes to atteſt the ſame, which they did; and ſhe declared the ſame to be her will, and delivered it to one, who kept the ſame till her death. The Maſter of the Rolls thought the ſtamp equivalent to a ſeal, without having recourſe to the wafer which annexed the ſtamped paper to the other; and he therefore held it an inſtrument executed according to the power. Firſt point in *Sprange* v. *Barnard*, 2 *Bro. Ca. Cha.* 585.

7. A power to revoke the old and declare new uſes, *with the conſent in writing of truſtees*, was held ill executed, where the appointor ſigned the conſent in the name of one of the truſtees, under a general

general power to conſent to any deed he choſe to make. *Hawkins* v. *Kemp*, 3 *Eaſt*, 410.

8. And the power being to revoke and appoint a-new, *by deed inrolled*, another deed of revocation, properly executed and aſſented to, but not inrolled till after the appointor's death, was on this account held bad; it being held that every act required to be done in the execution of a power, muſt be completed in the lifetime of the perſon executing it. *Ib.*

Sect. III. In regard to adhering to the *particular Acts* authoriſed.

1. IN replevin, the defendant avowed upon a ſettlement; with a power to *R.*, by deed or laſt will, to give or deviſe 200*l.* to any younger child unmarried, or what on marriage, ſhould be agreed to be paid, or an annuity out of the twenty acres in queſtion, to continue *ſo long* after the deviſor's death as the daughters' *portion*, or *what* ſhould be agreed on marriage, or any part thereof, ſhould be *unpaid*, until they received 200*l.* a-piece. Afterwards *R.* agreed to pay the defendant 150*l.* marriage portion, and an annuity was granted until 150*l.* ſhould be raiſed. The defendant avowed for a year's arrear. It was contended, on this point of the caſe, that, this was not good, any more than limiting an eſtate for *two* lives would be in a power to leaſe for *three* lives; but it was anſwered, that *the grant was* in the *words* of the power; to which the court agreed, and *Jones* and *Twiſden* ſaid, it had been held, on the ſtatute of leaſes, on the words, "otherwiſe than for *three* lives or twenty-one years," that a leaſe for a leſs period was good. And the principal caſe was adjudged for the defendant. *Briers* v. *Bolton*, 3 *Keb.* 692. 20. 745. 15.

2. Upon a marriage ſettlement, *a power* was given to every tenant for life, when in poſſeſſion, to limit hereditaments to any woman he ſhould marry, *for her life*, by way of jointure and in bar of dower. The tenant for life made a leaſe for 99 years, *determinable* on the death of his wife; and it was held, on a ſpecial verdict on ejectment in *B. R.* that, however ſhe might be entitled to relief in a court of equity, yet, *at law*, it could never be *ſaid* to be *an execution* of the power; for the *eſtates* were very *different*, the one being *a freehold*, and the other *a chattel*, and the freehold in her being a qualification in any after-taken huſband to be a member of parliament, kill game, *&c.* But Lord *Talbot* held the leaſe to be warranted by the power, ſaying, that it was not a *defective* but a *blundering* execution; and he decreed the defendant to pay all the coſts both in law and in equity. *Rattle* v. *Popham*, 2 *Stra.* 992. See 2 *Burr.* 1147. 2 *Veſ.* 644.

3. A power in a marriage ſettlement of an undivided third part of an eſtate to *make ſale of, or convey in exchange*, for or in lieu of other manors, lands and hereditaments, the ſaid undivided third part of all or any of the ſaid manors, *&c.* for the beſt price in money or ſuch other equivalent intereſt in manors, lands, and hereditaments as to the truſtees ſhould ſeem proper. This power

was

was held to authoriſe a partition, the effect of which was preciſely the ſame as an exchange as to the intereſts of the parties. *Abel* v. *Heathcote*, 2 *Veſ. jun.* 98. 4 *Bro. Ca. Cha.* 278. S. C.

4. A power in marriage articles to *charge* an eſtate agreed to be limited, after the parents' deaths, to the firſt and other ſons, &c. with ſuch ſums for the benefit of younger children as the father ſhould appoint, was held well executed by his directing *a ſale*. *Long* v. *Long*, 5 *Veſ. jun.* 445.

5. A power in a ſettlement to appoint lands *to* children was held well executed in equity by a deviſe to truſtees to ſell, and an appointment of the purchaſe money to the children. *Kenworthy* v. *Bate*, 6. *Ib.* 793.

Sect. IV. With reſpect to the *Indication of an Intent to execute* the Power.

1. *C.* Deviſed the income and produce of 1000*l. South-Sea* ſtock to *F.* for life, and gave him a power to diſpoſe of 400*l.*, and in default, &c. he gave the ſame to a charity. *F.* made his will, and thereby gave ſeveral legacies, and then deviſed the *reſt* and *reſidue* of his perſonal eſtate amongſt his neareſt relations. The queſtion was, Whether this 400*l.* paſſed by that deviſe of the *reſidue*, and whether that was a *good execution* of the power? *Parol* evidence was offered to prove, that it was the intent of *F.* that the 400*l.* ſhould be diſpoſed of by his will; but it was not allowed by the Maſter of the Rolls, who held, that this was *not* an execution of the power; but that the 400*l.* muſt go over according to the will of the firſt teſtator. *Moulton* v. *Hutchinſon*, 1 *Atk.* 559. 2 *Eq. Ca. Abr.* 659. note *a*. S. C.

2. *C.* ſurrendered a copyhold eſtate to *B.* and another to the uſe of the wife of *C.* for life, and, after his death, to pay the rents and profits to all her children equally, and *then* in truſt to ſuch uſe or uſes as *C.* ſhould by deed or will appoint; and for want, &c. to his ſon *J. C.* and his heirs. The wife died; and then *C.* made his will, in which there was the following clauſe: "As to "all the reſt, reſidue, and remainder of my effects, real and per- "ſonal, of what nature, kind, or quality ſoever, I give to my ſon "*G. C.* in full bar and ſatisfaction of what he may claim by vir- "tue of the cuſtom of *London*, or otherwiſe." The queſtion was, Whether *C.* had, *by his will*, made a *proper appointment* to *G. C.* of the copyhold eſtate? Lord C. *Hardwicke* obſerved, that, though a man might execute a power without reciting it, or taking the leaſt notice of the power; yet it was neceſſary he ſhould mention the eſtate which he diſpoſed of, and he muſt do ſuch an act, as ſhewed that he took notice of the thing which he had a power to diſpoſe of. *C.* had *other lands* on which the deviſe to *G. C.* might be ſatisfied. Here was nothing that was at all deſcriptive of the thing which *C.* had a power to diſpoſe of, but what was *applicable* to other eſtates of which he was ſeiſed, and of which he could equally diſpoſe; and his lordſhip was of opinion, that the

power was not executed. *Ex parte Caſwall*, 1 *Atk.* 559. *Roe* v. *Read*, 8 *Term Rep.* 118. S. P.

3. One, by his marriage ſettlement, had a power to charge an eſtate with 2000*l.* after the death of his wife, and a term of years was raiſed for that purpoſe. The huſband made a will in theſe words; "*Firſt, I charge all my real eſtate*," &c. and it was held by Lord *Hardwicke*, that, if a man had a power to charge an eſtate, it was not neceſſary in the execution of it that he ſhould refer to the deed out of which the power aroſe; for, in a court of equity, it was enough that his intent appeared; and if, in the execution, he ſufficiently deſcribed the eſtates he had a power to charge, (and here he had charged all,) the eſtate would be certainly bound; *eſpecially where the perſon charging was a purchaſer of the power.* And his lordſhip held, that the power was well executed. *Probert* v. *Morgan and Clifford*, 1 *Atk.* 441.

4. Tenant for life of a truſt eſtate, with a power to ſettle a jointure on any woman that he ſhould marry, not exceeding 500*l.* a-year, by deed, in conſideration of his marriage, and of a marriage portion of 3000*l.*, reciting his power, and *that he was minded to execute it in the fulleſt extent*, limited to his wife for her jointure ſeveral farms of the yearly value of 499*l.* 14*s.*, according to the rents they were then let at. Soon afterwards he made his will; and finding that the lands, when the leaſes expired, would ſink in their value about 70*l.* a-year, (which they accordingly afterwards did,) he by a codicil thereto *deſired and earneſtly requeſted* his ſon, inaſmuch as the lands he had ſettled upon his mother were greatly fallen in value, to make up her jointure 500*l.* a-year. Sir *J. Jekyl*, at the Rolls, was of opinion, that the will, as auxiliary to the ſettlement, might be conſidered as completing that which, though the obvious intention of the parties, was, on account of their taking the falſe criterion of the rental to aſcertain the value, before imperfect; and he held, that the words *deſire and requeſt* were ſufficient for this purpoſe. *Vernon* v. *Vernon*, *Ambl.* 1.

5. On the marriage of *A.* with *B.* his wife, a ſum of 3000*l.* 3 *per cents*, the property of *B.*, was veſted in truſtees, amongſt other purpoſes, after the death of the ſurvivor of *A.* and *B.*, and upon the event which happened, of there being no children of the marriage, to transfer the ſtock as *A.* ſhould by deed *or will* appoint. *A.* made his will, and gave ſeveral pecuniary and ſpecific legacies, "*and all the reſt and reſidue of his monies, and ſecurities for money, goods, chattels, and perſonal eſtate whatſoever, and of what nature or kind ſoever*, after the death of his wife, he gave" to the defendant. The teſtator's property was inſufficient to pay the legacies by about 600*l.* The queſtion was, Whether the 3000*l.* paſſed by this reſiduary bequeſt? The Maſter of the Rolls ſtated the following rule from 12 *Mod.* 469. "When one has an authority, and does an act which can be good no other way, but by virtue of that authority, it ſhall be underſtood to have been done by virtue of it; but when one has an intereſt, and an authority together, and does an act *generally*, it ſhall be conſtrued in relation

" tion to his intereſt, and not to his authority." Applying this doctrine to the caſe before him, his Honor was of opinion, that the will was not an execution of the power. And this decree was, upon an appeal to the Lord Chancellor, confirmed. *Andrews* v. *Emmett*, 2 *Bro. Ca. Cha.* 297. *Buckland* v. *Barton*, (K) *infra*, *pl.* 3. S. P.

6. £.4000 was ſettled in truſt after the death of the huſband and wife, for the children of the marriage, in ſuch proportions as the huſband and wife, or the ſurvivor, ſhould appoint. There were four children. By the marriage-ſettlement of one of them it was recited, that " whereas ſhe was entitled to 1000*l.*, part of " the ſum of 4000*l.*, payable at the death of the father: and alſo " to a ſum of 500*l.*, both which would belong to her intended " huſband; and whereas the father had agreed to ſecure an addi- * tional portion; in conſideration thereof," &c. the ſettlement proceeded; but no appointment was ever made. This recital was held a good appointment of the 1000*l.*, the mode never being regarded where the intent is clear; and here the father declared her entitled to this ſum, and the huſband made a ſettlement in conſideration of it. *Wilſon* v. *Piggott*, 2 *Veſ. jun.* 351.

7. Deviſe of real eſtate in truſt to ſell, and the produce, with the reſidue of the perſonalty, to be in truſt for teſtator's wife for life, and after her deceaſe, as to one moiety, for ſuch perſon or perſons as ſhe ſhould by any deed or writing, or by will with two or more witneſſes appoint; and for want, &c. over. The real eſtate was not ſold. The wife, not having any real eſtate, by will atteſted by three witneſſes, after bequeathing ſome ſpecific articles, made this diſpoſition, " all the reſt, reſidue, and remainder of my " eſtate and effects, of what nature or kind ſoever, and whether " *real* or perſonal, and all my plate, china, linen, and other uten- " ſils which I ſhall be poſſeſſed of, intereſted in, or entitled to at " the time of my deceaſe, ſubject to all my juſt debts, I give to " *A. B.*" Held an execution of the power. It would be difficult, ſaid the court, to explain that the widow's intereſt under her huſband's will was not her eſtate. She had the enjoyment of it during her life, and a power of diſpoſing to whatever perſon and in whatever manner ſhe pleaſed, with the ſmall addition of two witneſſes. By her will ſhe gave all her eſtate and effects, with augmentative phraſes. But take it according to the ſtrict technical rule in *Clere*'s caſe, that a general diſpoſition will not paſs what the party has only *a power* to diſpoſe of, unleſs it be neceſſary to ſatisfy the words of the diſpoſition, here the widow had no other real eſtate. *Standen* v. *ſame*, 2 *Veſ. jun.* 589. Decree affirmed in *Dom. Proc.* 3 *ib.* 300. (A).

8. Settlement of an eſtate in *Yorkſhire* to the uſe of the father for life, remainder to *M.* his eldeſt ſon for life, remainder to his iſſue in the uſual courſe of limitations, remainder to *W.* his ſecond ſon and his iſſue, in like manner; with power for *M.* and *W.*, *when they ſhould reſpectively be in the actual poſſeſſion of the premiſes*, to appoint the ſame or any part thereof to a wife for her life, for

her jointure. Prior to *M.*'s marriage with *J.* he and his father enter into articles, that, if the marriage ſhould take effect, *M.* ſhould, within twelve months afterwards, ſettle and aſſure to *J.* *an eſtate* during her life, to take effect from his death, *in freehold lands in the county of York*, of 100*l. per ann.* or elſe an annuity of 100*l. per ann.* to be iſſuing out of freehold lands in the county of *York*. The father died within twelve months; *M.* took poſſeſſion and died, without having made any ſettlement, and without having had any other real eſtate. Held in Chancery, that the eſtate was bound by the articles in the hands of the remainder-man; the court conceiving that, at the time of making them, the power was in contemplation of the parties, as the ſon had no other real eſtate out of which he could make the ſettlement; and this being for the conſideration of marriage, the court would ſupply the defect. *Jackſon* v. *ſame*, 4 *Bro. Caſ. Chan.* 462.

9. Bequeſt of 1000*l.* conſolidated bank annuities, to truſtees for the ſole uſe and benefit of teſtator's daughter *E.*, the ſame not to be ſubject to the debts, control, *&c.* of her then or any after-taken huſband; and, at her death, the ſaid ſum to be abſolutely in her power to diſpoſe of by her laſt will and teſtament, or any deed or writing purporting to be her laſt will and teſtament, to any perſon or perſons, purpoſe or purpoſes, ſhe ſhould think fit; but if no ſuch appointment, then the ſame to become the property of teſtator's grand-daughter. *E.*, the daughter, by her will, after giving ſome ſpecific legacies, proceeded thus: "All my freehold "meſſuages, lands, woods, and hereditaments, and alſo all *my* "*ſtocks, funds*, monies and ſecurities, and all other my real and "perſonal eſtate and effects whatſoever, I give, deviſe, and be-"queath the ſame reſpectively unto," *&c.* Held at the Rolls, that this amounted to an appointment of the 1000*l.* bank annuities, the bequeſt of which was not a mere power to diſpoſe, but an abſolute gift, qualified only as to *E.*'s ſituation as a married woman, and to prevent the huſband from taking as adminiſtrator in caſe of her death. How otherwiſe could property be given to a married woman? This muſt be included in the word *my*, being an abſolute intereſt in her. *Hales* v. *Margerum*, 3 *Veſ. jun.* 299.

10. By marriage ſettlement, ſtock was veſted in truſtees for *A.*, the huſband, for life, and if the wife ſhould ſurvive him, in truſt to transfer, *&c.* the ſame in ſuch manner and form as *A.*, by his laſt will and teſtament in writing, or by any other writing duly executed by him in the preſence of two or more witneſſes, ſhould appoint; and, in default of appointment, then for the children of the marriage. *A.* died in his wife's lifetime, without having made appointment of the ſtock; but by his will, after general introductory words, declaring his intent to diſpoſe of his eſtate and effects, which he had or was intereſted in, but not noticing his power, or the ſtock, gave ſome ſmall legacies, and appointed his wife and another he utors. Held, that the will was not an execution of the exec 1, he words being applicable only to the teſtator's abſolute property;

property; and this caſe was diſtinguiſhed from the two preceding ones, in which the words would otherwiſe have been inoperative, as the teſtatrixes had no other right of diſpoſition. *Langham* v. *Renny*, 3 *Veſ. jun.* 467. *Nannock* v. *Horton*, 7 *Ib.* 391. S. P. where it was held, there could not be an inquiry into the circumſtances of the teſtator's property.

Sect. V. With reſpect to the *Time* or *Event*, at or upon which it may be executed.

1. MR. *Hargrave*, in the latter part of note 2. to *Co. Litt.* 113. *a.* obſerves, that Lord *Coke* takes for granted, that, if there be a deviſe to *A.* for life, and that, *after his deceaſe, the lands ſhall be ſold by the teſtator's executors*, they cannot ſell the *reverſion*, but muſt wait till the death of the tenant for life; and that the caſe there cited from *Bro. Abr. Deviſe, pl.* 1. countenances this opinion. But the annotator informs us, that in one report Judge *Haughton* argues, that the words "*after the deceaſe* of the tenant for life, mean only to mark the determination of his eſtates, *not to limit the time for ſale*; and therefore, that a ſale may be in his lifetime; and that, in another, Judge *Clench* expreſſes himſelf almoſt to the ſame purpoſe, 2 *Bulſt.* 125. *Godb.* 46. And he adds, that there is alſo a caſe againſt Lord *Coke* in 2 *Leon.* 220. and that the point is doubted in *Cro. Car.* 382.

2. By marriage ſettlement, lands of the feme were conveyed to the uſe of the huſband for life, remainder to the uſe of the wife for life, remainder to the uſe of ſuch child or children of the marriage, for ſuch eſtate and eſtates, and ſubject to ſuch powers, proviſoes, *&c.* as the wife ſhould by deed or will appoint; and for want of ſuch appointment, to the uſe of ſuch child or children, and his and their heirs, equally, as tenants in common; *and for want of ſuch iſſue*, to ſuch uſes as the feme ſhould appoint, and for want, *&c.* to her right heirs. There was iſſue of the marriage one ſon. The huſband died in the lifetime of the wife; who, by her will, reciting the ſettlement, gave the premiſes to the ſon in fee; but, *in caſe he ſhould die before* 21, *and without iſſue*, then over. The ſon ſurvived the mother about five years, and then died, an infant and without iſſue. On a diſpute between his heir at law and a claimant under the will of the mother, it was held in *C. B.* that the appointment by the will was void, there being a ſon then living. And it was ſaid that, as there was iſſue living *at the time of her death*, her power to give it to a ſtranger could never have ariſen, for ſhe had no ſuch power, but upon failure of iſſue; though, added *Lee* Ch. J., had the ſon died in her lifetime ſhe might have had the power of diſpoſing it, agreeably to *Holt* v. *Burleigh*, (ſtated in 8 *Vin.* 220. *pl.* 13.) *Doe* v. *Denny*, cited in 2 *Wilſ.* 337. 1 *Ib.* 270. *a.* S. C. See *Roe* v. *Dunt*, 2 *Ib.* 336. *b.* See alſo *Deviſe*, (l. 6) *ante*.

3. Lands were deviſed to the uſe of *A.* and his iſſue, in ſtrict ſettlement, remainder to *B.* and his iſſue in like manner; with

power for *A.* and *B.* when they ſhould reſpectively be in poſſeſſion from *time to time*, by deed *or deeds*, to aſſign, limit and appoint to, and for, *any wife or wives*, an eſtate for life of all, or any part of the ſaid lands, (which altogether, were of the annual value of 190*l.*) In 1712 *A.* married; and by ſettlement appointed 98*l.* *per annum* to truſtees and their heirs, in truſt for *E.* his then wife, for, and in name, and in lieu of her jointure; with a proviſo, that, if *E.* ſhould not, within three months after widowhood, releaſe her dower, the ſettlement ſhould be void; and a covenant, that *E.* and his ſons by her, ſhould quietly enjoy, according to the limitations of the deviſe. In 1738, *A.*, by another deed, releaſed the proviſo in the former deed; and, in 1751, he, by another deed, reciting the former, and that he had ſince received 600*l.* additional fortune, appointed in the ſame form, all the reſt of the land to truſtees for her during her life after his deceaſe, for increaſe of her jointure. It was contended, that the additional jointure in 1751, was not warranted; ſince the power was completely *exhauſted* by the *firſt* deed, which had no expreſs reſervation, nor intended any. *Sed per curiam*—"In the natural "conſtruction of this power, there was nothing to bound it, but "the will and diſcretion of the huſband. The deviſe was drawn, "as if intended, that the power ſhould be executed at different "times; '*by deed or deeds, from time to time.*' It has been ſaid, "that this was made to take in the caſe of *ſubſequent* marriages. "The words '*wife or wives*," would *alone* have been ſufficient "to anſwer that. For, common ſenſe would ſhew, that one wife "muſt be dead before there could be any new appointment to "another. The former words were therefore nugatory, unleſs "thus interpreted. The intention then was clear, namely, that "it was originally intended to be awarded at different times, "even upon the ſame woman." And it was obſerved, that the words of the power in *Harvey* v. *Harvey*, (ſtated in 16 *Vin.* 480, *pl.* 12.) were not ſo ſtrong as theſe in the preſent caſe. It was alſo argued, that *A.*, by the terms of the firſt deed, had bound himſelf from making any further jointure, but this, the court ſaid, could not be inferred. *Zouch* v. *Woolſton*, 1 *Black. Rep.* 281, 2 *Burr.* 1136. S. C.

Sect. VI. With reſpect to *the Appointee.*

1. A Mother, having a power to diſpoſe of 600*l.* among her three daughters, *in ſuch proportions*, and payable in ſuch manner as ſhe ſhould think fit, gave 300*l.* thereof at different times to one, 200*l.* to another, and 100*l.* only to a third (who had married without her conſent). It was held, that the mother was authorized to vary the proportions, ſhe being made the judge; and that, if ſhe made an inequality, the court would not enter into the motives of it, unleſs it were illuſory; as, in a caſe, where a mother, having ſuch a power, gave only an eleventh part to a daughter; and that, even in ſuch a caſe, if the child by miſbehaviour deſerved

deſerved it (though it muſt be very groſs indeed), the court would not vary it. In *Maddiſon* v. *Andrew*, 1 *Veſ.* 59. See *Liſter* v. *Robinſon*, and *Auſtin* v. *Auſtin* (3 *Vin.* 437. *pl.* 11. and ſide note) S. P.

2. In *Alexander* v. *Alexander* (ſtated in (A. 7) *ante*) it was ſaid by Sir *Thomas Clarke*, that the wife, under her power of apportioning the ſhares, might have given an intereſt for life in a particular ſhare to one child, or have limited the capital of the ſame ſhare to another, or even to a third upon a contingency; but that ſhe could not have given any one child *merely a reverſionary intereſt*, for it was intended as a *proviſion*, and therefore ſuch an appointment would be deemed illuſory. 2 *Veſ.* 642. *Adams* v. *Adams*. (A. 7) *ſec.* 3. *pl.* 4. *ſup.* S. P.

3. Teſtator gave all his real and perſonal eſtate to his wife, to the end that ſhe might give her children *ſuch fortunes as ſhe ſhould think proper*, or they beſt deſerved; to whom he charged his ſons and daughters to be dutiful and obedient. There were five children of the teſtator who ſurvived him, a ſon by a former wife, and four daughters by his laſt. The ſon had an eſtate ſettled upon him of 400*l.* a-year; the daughters had portions of about 500*l.* a-piece. The mother, by will, in execution of the power, deviſed the eſtate to truſtees to ſell; and, out of the money, to pay two of the daughters 200*l.* a-piece, to the ſon one guinea, and the remainder to two other daughters. Bill by the repreſentative of the ſon to ſet aſide the appointment as illuſory. For the daughters it was ſaid, that the wife had a diſcretionary power, which ſhe had executed very properly, conſidering the proviſion which the ſon was entitled to; and, though the father might know of that proviſion, yet he did not mean it ſhould not have weight with his wife in the execution of the power. And Lord *Camden* being of the ſame opinion, the bill was diſmiſſed. *Burrell* v. *Burrell*, *Ambl.* 660. *Macey* v. *Shurmer*, *Atk.* 389. S. P.

4. Teſtator, ſeiſed of freehold and copyhold eſtates, the latter of which had been lately ſurrendered to the uſe of his will, after ſeveral bequeſts, gave the reſidue of his real and perſonal eſtate to his wife for life; and then followed this clauſe: "And my fur-"ther will is, that my ſaid wife ſhall, and I do hereby give her full "power and authority to diſpoſe of the ſame, in and by her laſt "will and teſtament to be duly made, *to and amongſt ſuch of my* "*relations as ſhall be living at the time of my deceaſe, in ſuch parts,* "*ſhares, and proportions, and as ſaid wife ſhall think proper.*" After the teſtator's death, the wife made her will; and thereby, after reciting the power, gave the freehold and copyhold premiſes to *P. T.* a relation of her huſband, in fee. It was contended that, under the power to give to "*ſuch of*" the teſtator's relations as, *&c.* the wife could not elect one only, but was bound to diſtribute. It was held, however, in *B. R.* that the power was well executed, the wife's authority being quite diſcretionary as to the objects. And it was obſerved, that the caſe of powers to diſtribute among *children*, which was there adduced in argument againſt

the validity of the execution, ſtood upon very different grounds; ſince powers of that nature were conſidered as *portions* for the children. *Spring* v. *Biles*, 1 *Durnf. & Eaſt*, 435, note.

5. By marriage ſettlement, a manor and lands were limited to the huſband for life, remainder to the wife for life, remainder to *all and every* the child and children of the marriage, in *ſuch parts, ſhares, and proportions*, and for ſuch eſtate and eſtates, not exceeding an eſtate or eſtates in tail, *&c.* as the huſband ſhould by deed or will appoint; and in default of appointment, *equally*. The huſband, by his will, appointed one acre of the premiſes to his eldeſt ſon *A.* and his daughter *B.* for their lives, and the life of the ſurvivor, with remainder to ſuch perſon as ſhould be entitled to the reſidue of the premiſes; and he then appointed the reſidue to his ſon *C.* and his iſſue in ſtrict ſettlement, with remainder over. Ld. C. *Thurlow* was of opinion, that the execution intended by the teſtator was totally illuſory, and void. *Pocklington* v. *Bayne*, 1 *Bro. Ca. Ch.* 450. See *Pawlett* v. *Pawlett* (A. 7) *ſect.* 2. *pl.* 1. *ante*.

6. By ſettlement made on the marriage of *A.* with *B.* his wife, lands were limited, in remainder expectant upon ſeveral eſtates which afterwards determined, to the uſe of *A.* for life, remainder to the uſe *of ſuch child and children* of *A.* by *B.*, and for ſuch eſtate and eſtates, intents and purpoſes, as *A.* ſhould, by any deed in writing, or by his laſt will, to be executed, *&c.* appoint; and for want of appointment, then to the uſe *of all and every* the ſame child and children, as tenants in common in fee. There being iſſue of the marriage two children, a ſon and a daughter, *A.*, by deed, appointed the premiſes, after his death, to the ſon in fee tail, remainder to the daughter in fee ſimple. This excluſive appointment to the ſon, it was contended, was not warranted by the power; and *Pocklington* v. *Bayne* (above ſtated) was cited. But held in *B. R.* that the power was well executed; *Buller* J. obſerving, that the terms of it were, "to ſuch *child* and children," and not "to and *amongſt all and every*," as in the cited caſe; and thus the appointor was expreſsly authorized to give to *one*; and he thought *Spring* v. *Biles* (*pl.* 4. *ſupra*) was with the difference only of *relations* inſtead of *children*, a ſtronger caſe than the preſent, the power there being, to and *amongſt*, *&c.* in ſuch *parts, ſhares, and proportions*, which imported that a *diviſion* was intended. *Swift* v. *Gregſon*, 1 *Durnf. & Eaſt*, 432.

7. Feme covert, purſuant to a power, bequeathed, in an event which happened, two third parts of a certain fund worth about 5000*l.* to her children equally, and ſhe gave the remaining third part to her huſband for life; and after his deceaſe to be divided *among his children in ſuch ſhare or ſhares as he ſhould think proper*; and in caſe her ſaid huſband ſhould educate and bring up his ſons and daughters, ſhe directed he ſhould have the intereſts of their reſpective fortunes. The huſband appointed 5*l.* to one child, two other ſmall ſums to two other children, and the reſidue of the third part over which his power extended to three other of the children. At the Rolls:—The intent was to give each child ſome ſhare; and

and *that* muſt be a ſubſtantial ſhare, or a reaſon muſt be aſſigned. But here no reaſon was aſſigned or proved. The appointment was therefore held illuſory and void. *Spencer* v. *Spencer*, 5 *Veſ. jun.* 362. See Kemp v. Kemp, Ib. 849. The words there were to A. for life, "and then to be diſpoſed of amongſt her children as "ſhe ſhall think proper."

8. Voluntary bond to pay 600*l.* "unto and amongſt *all ſuch* "*child or children* of *A.* as the obligor ſhould by deed or will ap-"point;" and for want of appointment, to and amongſt all ſuch child or children of *A.* as might ſurvive the obligor. An appointment by will of the whole to one of ſix children eſtabliſhed; the obligor having clearly reſerved to himſelf the power to fix the objects. *Wollen* v. *Tanner*, *Ib.* 218.

9. A power, given by will to appoint 1000*l.* for the benefit of a married woman and her family, was held, from the accompanying circumſtances, but not as a general rule, to authorize an appointment to the huſband. *M'Leroth* v. *Bacon*, *Ib.* 159.

See (A. 7) *ſect.* 2. *ſupra*.

(A. 15) To charge, &c. Land, &c. well executed; in reſpect of *the Perſon doing it. Feme covert*, [*Infant*,] &c. 16 Vin. 481.

1. ONE ſeiſed in fee, on his marriage, ſettled lands on himſelf for life, then to his wife for life, remainder to the iſſue of the marriage, then over. And the deed contained a proviſo, that it ſhould be lawful for the wife, *during her life*, to demiſe the premiſes to any perſon for ſuch term, with and under ſuch conditions, rents, and reſervations, in ſuch manner to all intents as tenant in tail might do by the ſtatute 32 *Hen.* 8. The huſband died, and the wife married again; and *then* ſhe and her ſecond huſband demiſed the premiſes purſuant to the power. And two queſtions were made. Firſt, whether, the leaſe being made by huſband and wife, when the power was given to her alone, this was a good execution thereof, or whether it was not ſuſpended by the marriage? Secondly, whether this leaſe by the huſband and wife ought not to have been made by fine? And it was held, upon the firſt queſtion, that this was a good execution, notwithſtanding the coverture. And, as to the ſecond, that no fine was neceſſary; for the eſtate of the leſſees was not derived from the leſſors, but aroſe out of the eſtate of the feoffees or releaſees named in the original ſettlement. And that, therefore, nothing more was requiſite to raiſing it than what was required by the deed which created the power. *Bailey* v. *Warburton*, *Com.* 494. See *Harris* v. *Graham*, ſtated in 3 *Vin.* 419. *pl.* 12. and ſecond point in *Godolphin* v. *Godolphin*, 1 *Veſ.* 21.

2. The caſe of *Rich* v. *Beaumont*, ſtated in 4 *Vin.* 168, *pl.* 26. and 22 *Ib.* 277. *pl.* 47. has been ſince reported in 3 *Bro. Ca. Parl.* 308.

308. But the reporter, after ſtating that the court of Chancery directed a caſe for the opinion of the court of *K. B.* adds, in a note, that, after a very laborious ſearch, he had not been able to diſcover a ſingle trace of any further proceedings in the cauſe, except an order of the court of Chancery, directing the caſe to be ſettled by the Maſter, in caſe the parties differed in ſtating it. See *Powell* on *Powers*, 36. S. C.

3. *A.*, having an only daughter about 16 or 17 years of age that had married *B.* clandeſtinely, who ſoon afterwards became a bankrupt, by his will deviſed all his freehold, copyhold, and real eſtate, and all his leaſehold eſtate to truſtees, their heirs, executors, adminiſtrators, and aſſigns, in truſt to apply the reſidue, after paying their own charges, to the ſole uſe of his daughter during her life, and not to be ſubject to the debts or control of her huſband, and to permit her by deed or writing, executed, *&c.* notwithſtanding her coverture, to give and diſpoſe of all his freehold, copyhold, and leaſehold eſtate as ſhe ſhould think fit, ſhe having a particular regard to his poor relations in *Cornwall*; and he gave to the ſame truſtees, whom he made joint executors, his perſonal eſtate, in truſt for the ſeparate uſe of his daughter. *A.* died ſoon afterwards. His daughter, being under 21, though above 17, after her huſband's bankruptcy, and whilſt living ſeparate from him, made her will, and thereby, in purſuance of the power given her by her father's will, bequeathed to her daughter *M.* 3000*l.* to be paid her at 21, with a proviſion for her maintenance in the interim. She then gave legacies to ſome poor relations, appointed the two truſtees in her father's will, and two others joint executors, guardians, and truſtees to her daughter, and then deviſed the reſidue of her real and perſonal eſtate to the plaintiff. One queſtion was, whether the will of the daughter was a good execution of the power in her father's will as to the real eſtate? Lord *Hardwicke* remarked, that this queſtion had never been determined that he knew of. He could find no caſe where a power, given generally, could be executed by an infant; and therefore he would make none. As to the general queſtion concerning powers, it muſt be admitted, he ſaid, that there were ſome powers which an infant might execute, as, where he was a mere inſtrument, or conduit pipe, where no prudence or diſcretion was required, or where his right was not affected. But this caſe was a power coupled with an intereſt. Beſides, there was an objection upon the penning of the power, againſt the daughter's executing it during infancy, for the teſtator, having the coverture in view, had excluded that diſability, giving her power to diſpoſe, notwithſtanding it; and would alſo have excluded the caſe of infancy, had he ſo intended. And his lordſhip was of opinion, that the power was not well executed as to the real eſtate: but, as to the perſonal eſtate, as the feme was above the age of 17, at which age, if ſole, ſhe might have made a will thereof, *that* was clear of the principal objection made as to the real eſtate; and therefore

the power was held to be well executed with reſpect to it. *Herle* v. *Greenbank*, 3 *Atk.* 696. 1 *Veſ.* 298. S. C. Mr. Hargrave in note Q Co. Litt. 113. a. entertains the opinion, which he fortifies by a train of argument and authorities, that a power to ſell, when given to executors, *ex nomine*, will go to the ſurvivor; by reaſon that it is annexed to their *office and character*, which itſelf ſurvives.

(A. 16) Suſpended, determined, or extinguiſhed. 16 Vin. 482.

1. BY the marriage ſettlement of *A. B.* lands were limited to him for life, remainder over in ſtrict ſettlement; with a power for the tenant for life in poſſeſſion to make leaſes for 21 years *in poſſeſſion*, reſerving the beſt rent. *A. B.* by leaſe and releaſe, conveyed all his life eſtate to *C.* and his heirs, in truſt to apply the profits in payment of an annuity of 150*l.* to *W.* during the life of *A. B.*, and the ſurplus to *A. B.* The year following he conveyed all his eſtate to truſtees for 99 years if he ſhould live ſo long, for payment of his debts; but with an expreſs reſervation of all leaſes granted or to be granted. Afterwards, he made a leaſe of the lands in queſtion to *L.* according to the terms of the power. It was contended, *firſt*, that after the conveyance to *C.* it was impoſſible for *A.* to grant a leaſe *in poſſeſſion*, he having thereby parted with the whole of his life intereſt; and therefore the leaſe to *L.* could not, in fact, commence till after *A. B.*'s death, who had no authority to grant ſuch a leaſe: 2*dly*, that by the conveyance to *C.* the power was extinguiſhed, with reſpect to *A. B.* Lord *Mansfield* obſerved, 1*ſt*, that it was not neceſſary that the grantor ſhould have *actual* poſſeſſion to execute the power; but he thought poſſeſſion there meant the receipt of the rents and profits, which were applied to his uſe. 2*dly*, That where, indeed, the whole life eſtate is conveyed away, the power muſt be at an end; but that the conveyance here was only to let in a particular charge, ſubject to which the rents ſtill belonged to *A. B.* The power was therefore held to be ſubſiſting, and well executed. *Renn* v. *Bulkeley*, 1 *Dougl.* 291. See *Goodright* v. *Cater*, (E.) *pl.* 4. *poſt.*

2. Bequeſt of reſidue of perſonalty to truſtees for *A.* for life, and then to and among all and every the children and child of *A.* if more than one, in ſuch ſhares and manner, for ſuch intereſts, *&c.* (in the fulleſt terms,) as *A.* ſhould appoint; and in default, *&c.* to veſt at 21. *A.* had two children, one of whom attained 21, and died in her lifetime. *A.* afterwards appointed the bulk to the ſurviving child; and held good, though only one object remained. *Boyle* v. *Biſhop of Peterborough*, 1 *Veſ. jun.* 299.

3. But where there was a power to appoint among children an appointment to one who was dead, ſo as to veſt it in the repreſentative, was rejected, the objects being perſonal. The death, however, of that one did not affect the power as to the reſt. *Maddiſon* v. *Andrew*, 1 *Veſ.* 57.

4. Mr.

4. Mr. *Butler*, in note 1. *Co. Litt.* 342. *b. et ſeq.* has laid down and ſubſtantiated, by a train of argument and authorities, ſeveral rules reſpecting the *ſuſpenſion and extinction of powers*. Theſe he premiſes with a general diviſion of powers, diſtributing them into powers *collateral* to the land, *i. e.* which are given to mere ſtrangers, who have not any intereſt in the land; and powers *relating to* the land, *i. e.* which are reſerved to perſons who have either a preſent or future intereſt in the land. And this latter ſort he ſubdivides into two claſſes, powers *annexed to the eſtate in the land*, and powers *in groſs*; the former being, where a perſon has an eſtate in the lands, and the eſtate to be created by the power is to take effect in poſſeſſion *during the continuance* of the eſtate to which the power is annexed; (ſuch as the power of leaſing in poſſeſſion given to *A. B.* in the above-ſtated caſe;) and the *latter* being, where a perſon has an eſtate in the land, but the eſtate to be created by the power is not to take effect till *after the determination* of the eſtate to which it relates; ſuch as a power to jointure an after-taken wife. As to powers *collateral* to the land, the annotator informs us, that a fine, feoffment, or common recovery will not extinguiſh or deſtroy them, nor can they be releaſed. As to powers relating to the land, ſuch of theſe as are in the nature of powers *appendant to the eſtate*, may be extinguiſhed by releaſe, feoffment, fine, or common recovery, and are alſo liable to be ſuſpended or extinguiſhed even by any of the conveyances which are ſaid *not* to operate by tranſmutation of the poſſeſſion, as bargain and ſale, leaſe and releaſe, and covenant to ſtand ſeiſed; and, as an aſſurance of this nature, which carries *the whole* of the grantor's eſtate, is a *total* deſtruction of the powers appendant to it, ſo, ſuch as carries *only a part* of the eſtate, *ſuſpends*, during the continuance of that eſtate, the exerciſe of the power, or at leaſt the eſtate to be raiſed by it; and any ſuch aſſurance, which induces only a charge upon the eſtate, neceſſarily ſubjects the eſtate to be created by the power to that charge. (See letter (C) *poſt.*) Next, with reſpect to powers *in groſs*, theſe, we are told, are not affected by bargain and ſale, leaſe and releaſe, or covenant to ſtand ſeiſed. And this, if the appointor even makes a conveyance in fee, by any of theſe aſſurances, as they do not paſs a greater eſtate than the grantor has a right to convey. But, if he conveys by fine, feoffment, or recovery, *which aſſurances convey a tortious fee*, the power will be extinguiſhed. A power *in groſs*, it is added, may be alſo releaſed to thoſe in remainder. But Mr. *Butler* obſerves, that, although it is ſaid, that a feoffment, fine, or common recovery *may* extinguiſh powers *annexed to the eſtate*, or *in groſs*, yet they do not *unavoidably* extinguiſh theſe powers in all caſes; and he inſtances the Earl of *Leiceſter*'s caſe, (ſtated in 16 *Vin.* 491, 2. *pl.* 14.) and *Herring* v. *Brown*, (ſtated in *ib.* 494. (E) ſide note to *pl.* 3.); in both which caſes the deed and fine *operated as an execution* of the power, and *not in extinction* of it. See *Ingram* v. *Parker*, ſtated in (C) *poſt.* See alſo *Butl.* note, ſtated in Suppl. tit. *Recovery*, (W) *poſt.*

(A. 17) Defective Execution. *Supplied in Equity.* 16 Vin. 483.

1. THE Maſter of the Rolls, in *Fitzgerald* v. *Lord Falconberge*, (ſtated 16 *Vin.* 492. *pl.* 20. and ſince reported in 3 *Bro. Par. Ca.* 543.) obſerved, that the ſecond poſition of Lord C. *King*, in *Sayle* v. *Freeland*, (ſtated in 16 *Vin.* 496, 7. *pl.* 2.) that, *if the power, in that caſe, had not been ſtrictly executed, equity would help in ſuch a little circumſtance, where the owner of the eſtate had fully declared his intent*, was going too far, unleſs there was ſome equitable circumſtance in the caſe; for it was contrary to the reſolution in the caſe of *Bath* v. *Montagu*, (ſtated in *Ca.* 14. *ante.*) See *Powell on Powers*, *p.* 152. *et ſeq.*

2. In the caſe of *Smith* v. *Aſhton*, (ſtated 16 *Vin.* 483. *pl.* 3. and ſide note,) one circumſtance ſhould be attended to, namely, that the eſtates chargeable with the portions were, ſoon after the death of *A.*, ſettled by *R.* (the eldeſt ſon of *A.*) upon his marriage, on his wife, (who had 500*l.* for her portion,) and the iſſue of the marriage, *without notice* of the notes in writing prepared by *A.*, which were afterwards found by the verdict to be his will.

3. *A.* upon his marriage covenanted, that his eſtate ſhould be chargeable with 1000*l.* for the benefit of younger children: and his wife having an eſtate of her own, ſhe and her huſband, after marriage, levied a fine of it, and the uſes declared were, that *A.* and his wife ſhould have a power, by any deed or writing under their hands and ſeals, or the ſurvivor of them, by his or her laſt will, *to appoint and divide the eſtate* among their younger children, in ſuch proportions as they or the ſurvivor ſhould think proper. *A.* ſurvived, and by his will gave his daughter, (who was the only younger child) 3000*l.* which, he declared, ſhould be in lieu and in full ſatisfaction of the 1000*l.* covenanted to be raiſed out of his own eſtate, and he charged the 3000*l.* on his wife's eſtate, intending thereby to execute his power. Lord *Hardwicke* was of opinion, that the power was, *in ſubſtance*, well executed. It was true, the direct terms of the power were not purſued; but the *intent* and *deſign* of it was: it was admitted, that the father might have appointed *part* of the *eſtate* to be ſold, and the money *raiſed* by ſuch ſale. And what was done was exactly the ſame thing. The court might order a ſale; and, though the will might not enure as a good execution of the power in ſtrictneſs, yet, within the meaning and deſign of it, it was a good charge for the young lady's benefit. *Roberts* v. *Dixall*, 2 *Eq. Ca. Abr.* 668. *pl.* 19.

4. *M.* having a power of charging a real eſtate with 4000*l.* by deed or will, executed in the preſence of *three* witneſſes, to any perſon ſhe ſhould appoint: ſhe, being about to marry, by articles, executed in the preſence of *two* witneſſes *only*, appointed 2000*l.*, part of the 4000*l.*, to be for the uſe and benefit of her intended huſband *during her coverture*; and after her death to her ſon. The other 2000*l.* ſhe made a voluntary diſpoſition of by will; but did

did not execute it in the preſence of *three* witneſſes. The firſt queſtion was, Whether the articles entered into upon the marriage amounted to an appointment of the firſt 2000*l.* within the power? Lord *Hardwicke* was of opinion that they did; for that, notwithſtanding it was inſiſted, that it was a defective appointment, becauſe there were only two witneſſes; yet this court could ſupply that defect, when it was executed for a *valuable* conſideration, *much more* when it was an execution of a truſt only, as was the caſe here. But, as to the other 2000*l.*, which was voluntarily diſpoſed of, as the power was not purſued, the appointment was held to be void. *Sargeſon* v. *Sealy*, 2 *Atk.* 412.

5. Lands in *W.* were limited to *J. M.* for life, with remainder to ſuch child or children of his body by *C.* his then late wife, for ſuch eſtates, and in ſuch ſhares, *&c.* as *J. M.* ſhould by any *deed* or deeds, will in writing, or other writing or writings, duly ſigned and executed in the preſence of *three* or more credible witneſſes, direct or appoint; and in default thereof, to ſuch children as tenants in common in tail. Upon the marriage of *A. M.*, one of the daughters of *J. M.* by *C.*, with *R. S.*, the ſaid *J. M.*, by indentures of leaſe and releaſe, *in conſideration of the marriage, and of a ſettlement, thereby made of real eſtates on the behalf of R. S.* granted, releaſed, and confirmed the lands in *W.* to truſtees, to the uſe of *R. S.* for life, remainder to truſtees, to preſerve, *&c.* remainder to *A. M.* for life, remainder to the iſſue of the marriage in the manner therein mentioned. The releaſe was executed by *two* witneſſes only. It was contended that, although this deed was a defective execution of the power given to *J. M.*, yet it ought to be ſupplied by the court, being *in conſideration of marriage.* And Lord *Thurlow*, being of that opinion, decreed accordingly. *Wade* v. *Poget*, 1 *Bro. Ca. Cha.* 364. See *Godolphin* v. *Godolphin*, (A. 12) *ſec.* 2. *pl.* 1. *ſupra.* and *Jackſon* v. *ſame*, (A. 14) *ſec.* 4. *pl.* 8. *ſupra.*

6. Defects in the ſurrender of copyholds, and in the execution of powers are governed by the ſame rules. In *Chapman* v. *Gibſon*, 3 *Bro. Ca. Cha.* 229. See Supl. tit. *Copyhold*, (M. a) *ante.* See (A. 14) *ſec.* 3. *ſupra.* (A. 20) *pl.* 1. *infra.*

16 Vin. 487. ## (A. 20) Powers in general, Conſtruction thereof, and of the Execution thereof.

1. ON a marriage, 1200*l.* 3 *per cent.* conſols were ſettled on the huſband for life, and then to the wife's appointment. The huſband afterwards, on a ſeparation, gave up his life intereſt for the wife's benefit, ſo as to let her power extend over it. The wife, by her will, diſpoſed of different ſums in the 3 *per cents.*; but directed, that if any of the legatees, except one of them, ſhould die before her huſband, their legacies ſhould revert to teſtatrix's executors. In a ſubſequent part of the will ſhe ſtated, that the money bequeathed was in the 3 *per cent.* conſols, *the intereſt whereof*

her

her husband was to enjoy, according to articles of separation between them, until his death. Although the testatrix clearly mistook her power, yet the Chancellor would neither decree payment nor declare the legacies vested; as there were no words to shew, what her will would have been, if she had understood her power; and to guess it would be going further than the court had ever done. *Smith* v. *Maitland*, 1 *Ves. jun.* 362.

2. By marriage articles certain monies were agreed to be vested in trustees to pay the yearly produce in certain proportions between the husband and wife for the wife's life; and if he should die before her, leaving issue by her, then, after her decease, to apply the capital in such manner as the husband should appoint by any deed or writing, attested, *&c.* or by his will; and for want of appointment, the capital to be divided among the issue of the marriage, share and share alike, at 21. Held, under the whole of the circumstances, that the father's power was not general, but confined to the issue of the marriage. In *Bristowe* v. *Warde*, 2 *Ves. jun.* 336.

3. One having a power by marriage settlement, to charge with an annuity an estate, of which he was tenant for life, with remainders to the issue of the marriage, and with an eventual remainder to himself in fee, executes the power by will. The contingent fee afterwards vested in him. Held, that though by the accession of the fee the power was gone, yet the gift should take effect out of his interest. *Cross* v. *Hudson*, 3 *Bro. Cas. Cha.* 30.

4. A power to fell timber with the consent of four trustees, was held not to be extinct by their deaths; but the court reserved the check. *Hewit* v. *Hewit*, *Ambl.* 508.

5. A power, when exercised, takes place of all the uses and estates in the original deed to which it is not declared subject. In *Mosley* v. *Mosley*, 5 *Ves. jun.* 248.

6. A power to revoke uses and appoint a-new, *by deed inrolled*, was held ill executed, where the inrollment was not made till after the appointor's death. *Hawkins* v. *Kemp*, 3 *East*, 410.

7. *G.* having a power to charge his wife's estate with 2000*l.*, by his will appointed it to different persons, and died indebted. Lord *Hardwicke*—"I am of opinion this ought to be considered "part of *G.*'s personal estate; where there is a general power "given or reserved to a person for such uses and purposes as he "shall appoint, this makes it his absolute estate, and gives him "such a dominion over it, as will subject it to his debts." And his lordship directed the personal estate to be first applied in payment of the debts, then the real estate descended, and then the 2000*l.* *Bainton* v. *Ward*, 2 *Atk.* 172. and cited 2 *Ves.* 2.

8. So where one having a power to charge money on land, executed it by a voluntary deed and died, the court held the charge to be personal assets in favour of creditors. *Park* v. *Bathurst*, 3 *Atk.* 269. *Troughton* v. *same*, *Ib.* 655. and 1 *Ves.* 86. S. P. So also in *Townshend* v. *Windham*, 2 *Ves.* 1. where there was a covenant in a certain event to allow such person as *A.* should by deed

or

or will appoint to receive the rents of an eſtate for a particular period. *A.* appointed, and the rents were rendered aſſets: but note theſe words of Lord *Hardwicke*: "It is inſiſted for the "plaintiffs (the creditors) that this is ſuch a kind of intereſt "granted, as the teſtator would be entitled to the benefit of, al-"though he made no particular appointment; but on conſidera-"tion, I am of opinion that, without making a particular ap-"pointment, neither he, nor any in his place, could have any "benefit of this covenant; for, taking it in any light, it muſt be "conſidered as a covenant or grant of the intereſt in the land. "Perhaps it partakes of both; but, conſidering it as a covenant, "what action of covenant could have been maintained by the ex-"ecutors of the teſtator upon this deed, until appointment made "by the teſtator? The very words ſhew there could be none: con-"ſidering it in another light, as a grant of the intereſt in the "land, it was ſuch as could not take effect until he made an ap-"pointment, for until then there was really no grant." *Ib. p.* 9.

16 Vin. 489. (C) What ſhall be a good *Revocation* according to the Power.

See the following Caſes, ſtated in (A. 14) *ante*.—*Hubbard*'s Caſe.—*Roſcommon* v. *Foulkes*, *ſect.* 1.—*Bath* v. *Montagu*, *ſect.* 2.

1. THE moſt circumſtantial ſtatement given by *Viner* of Sir *James Perrot*'s caſe, with reſpect to its principal point, which concerns the ſubject of the preſent ſection, will be found in 22 *Vin.* 227. *pl.* 9.

2. It was contended by Lord *Hale*, (on obſerving upon the caſe of *Ingram* and *Parker*,) contrary to the opinionof the three judges who decided it, that a bargain and ſale, although *not inrolled*, and fine afterwards, would be a good execution of a power to revoke under hand, within *Scroop*'s caſe, ſtated in 16 *Vin.* (C) *pl.* 1. namely, as an act of the donee of the power, which could not have *any* operation, *unleſs* it could take effect as an execution of the power; becauſe the bargain and ſale, *without enrollment*, would be void; but the fine alone would have been an extinguiſhment, nor would a deed of covenant to levy a fine have been of itſelf a ſufficient revocation, ſince it muſt have referred to a future act.

16 Vin. 493. (E) Power of Revocation [or other Power] extinguiſhed or determined, by what Act.

1. IN the caſe of *Fitzgerald* v. *Lord Fauconberge* (ſtated in 16 *Vin.* 492. *pl.* 20. and ſince reported in 3 *Bro. Par. Ca.* 543.), beſides the queſtion reſpecting the validity of the execution of the power of revocation, a ſecond queſtion was made, *viz.* whether the

the deed of 1715 was a *total* revocation, or only a revocation *pro tanto* of the deed of 1712 there mentioned; and it was held to be a *total* revocation, and thus the power extinct.

2. But, in the case of a *mortgage* by the donee of a power, *equity* considers it only a revocation *pro tanto*, since there the mortgagor still continues to be owner of the estate, subject to the charge, as in *Perkins* v. *Walker*, stated in 8 *Vin.* 153. *pl.* 7. and side note, and *Thorne* v. *Thorne*, stated in 16 *Vin.* 495. *pl.* 11. See *Devise* (R. 6) *ante*.

3. The following is a more circumstantial statement of the case of *Leigh* v. *Winter* than that contained in 16 *Vin.* 494. *pl.* 7.—*A.* conveyed lands to the use of himself for life, remainder to his son in tail; with a power of revocation, if his son married without his consent. Afterwards, by deed between him and his son's grandmother stating the power, and certain *considerations* given to *A.*, it was agreed, and *A. covenanted, granted*, and agreed with the grandmother, that he would not revoke any of the uses or estates limited to his son, nor execute any power of revocation concerning the same, without the previous consent of *B.* in writing; and that any such revocation, *&c.* should be void. The son afterwards married without the consent of *A.*, who thereupon *alone* revoked the settlement. It was held by Lord Ch. J. *Bramston* and *Jones* J. who were called into the court of Chancery to assist, that, by the second indenture, the power of revocation, which was absolute in the first, was restrained by the second deed, and could not be executed without the consent of *B.*; for the power was executory, and by subsequent agreement might be defeated. *Sir W. Jones*, 411.

4. By marriage settlement, an estate was limited to *A. B.* for life, remainder over; with a power to *A. B.* to sell the premises, and for that purpose to revoke the uses. *A. B.*, for securing to *H.* an annuity of 500*l.* sold by him to her for a valuable consideration, by indenture, granted the premises to *H.* for 99 years, if *A. B.* should so long live; and the next day took a demise thereof for 98 years and 11 months, at a rent of 500*l. per annum*. *A. B.* afterwards sold the estate, and, pursuant to his power, revoked the old uses, and limited the estate to the purchaser in fee, who at the time of his purchase had notice of the annuity. A dispute arose between *H.* and the purchaser, which depended upon the question, whether the same *A. B.* who made the demise to *H.* for a valuable consideration (the right to make which demise arose out of the nature of his estate) could be authorized to revoke it himself under any power in any settlement? And it was argued, on behalf of the purchaser, that a tenant for life, who had only a qualified or defeasible interest, could not alien the estate for his own life, discharged from the qualification that affected it in his own hands. That, therefore, every one who took an estate under him must take it as he held it, subject to the operation and consequences of the power of revocation. Lord *Mansfield* observed, that a gross fraud was attempted in this case, either upon

the purchaſer, or *H.* If the purchaſer, he ſaid, did not know of the incumbrance, then it was a fraud upon him; but it was found he knew of it, and therefore the fraud was upon *H.* And the court of *B. R.* unanimouſly held, that the demiſe to *H.* was not affected by the ſubſequent revocation. *Goodright* v. *Cator*, 2 *Dougl. C.* 478. See *Snape* v. *Turton*, ſtated in 16 *Vin.* 490. *pl.* 2.

5. A power of revocation to one, who becomes bankrupt, is deſtroyed by the bargain and ſale of the commiſſioners. 1 *Com. Dig.* 530.

6. By ſettlement of an undivided third part of eſtates three powers were given, firſt, to huſband and wife jointly to raiſe and appoint 3000*l.*, ſecondly, to huſband alone to raiſe and appoint 2000*l.*, thirdly, to the ſurvivor to raiſe and appoint ſuch a ſum as, with the money before raiſed under the other powers, would make up 5000*l.* There was alſo a power to the huſband and wife to revoke all the uſes for the purpoſe of ſelling or exchanging. The wife joined the huſband in raiſing for his benefit 3000*l.* under the firſt power; and he covenanted with the truſtees, that he would not, *during her life, and ſo long as the* 3000*l ſhould remain due*, charge under his ſole power, or any other power, without her conſent. After her death, he, by deed poll, charged with 2000*l.* more, to be paid his executors, and applied in payment of his debts and legacies, and otherwiſe in performance of his will, or as he ſhould appoint by it. He afterwards revoked the uſes for making a partition, whereupon ſpecific parts of the eſtates were conveyed in ſeveralty to the uſes of the ſettlement, ſubject only to the 3000*l.* He then married again and died, leaving his ſecond wife his executrix, without noticing the charge by his will; but the deed poll was found uncancelled among his papers. Held, that the 2000*l.* was well charged and went to his executrix, the covenant only preventing any further charge during the wife's life, who, had ſhe ſurvived him, would have been prejudiced by it; nor did the revocation for the purpoſe of partition affect the charge, the intent being to lay all the charges which were upon the undivided third part upon that which was to be taken in lieu of it. As to the deed remaining in his cuſtody, nothing was to be inferred from that, ſince it was not to take effect till after his death. *Earl of Uxbridge* v. *Baily*, 1 *Veſ. jun.* 499.

7. The benefit of a power given by will to charge leaſeholds for lives which were deviſed by it after the manner of ſtrict ſettlement, with 500*l.* for renewal of the eſtate from time to time, was held to be loſt to a tenant for life, who had taken a new leaſe to himſelf, his heirs, and aſſigns, and paid a large renewal fine, without communication with the remainder-man, or exerciſing his power at the time. In *White* v. *White*, 4 *Veſ. jun.* 24.

8. A power to fell timber with the conſent of four truſtees, did not become extinct by their deaths, but the court reſerved the check. *Hewit* v. *Hewit*, *Ambl.* 508.

9. See

9. See *Croſt* v. *Hudſon* (A. 20) *pl.* 3. *ſupra*, where a power, which was exerciſed by will, having afterwards become extinct by the devolution of the fee to the appointor in his life, it was held, that the gift ſhould take effect out of his intereſt.

(I) In what Caſes *new Uſes* may be limited; and how. 16 Vin. 498.

1. SEE *Chadwick* v. *Doleman*, 3 *Vin.* 423. *pl.* 46. where an appointment purſuant to a power, of a portion, *by deed, without a power of revocation*, to a *ſecond* ſon, who afterwards became an *eldeſt*, was held defeaſible, and to be accordingly revoked by a ſubſequent one to a daughter; not from any power of revoking, or upon the words of the appointment, but on account of the alteration in the *capacity* of the ſon.

2. The firſt point which aroſe upon the caſe of *Adams* v. *Adams*, ſtated in (*A.* 7) *ante* was, whether, there being *no power of revocation* reſerved in the deeds of the 3d *November* 1758, creating the power of appointment, nor in the deed dated the 20th *October* 1764, enabling the ſurvivor of the huſband and wife to make an appointment, *B.*, by the deed of the 4th *July* 1767, and *A.* and *B.* by the deed of the 29th *November* 1758, exhauſted the powers contained in the deeds of the 3d *November* 1758, and the 20th *October* 1764? And it was held they had not; for, the deed of the 29th *November* 1758, was revoked by the ſubſequent inſtruments of the 24th *September* and the 20th *October* 1764; and the appointment by *B.* of the 4th *July* 1767, was revoked by the deed of the 25th *October* 1771. The validity of which *latter* revocation muſt have depended upon *her* right to appoint with *power* of revocation. See (E) *ſupra.*

(K) Power, *aſſignable*, or not.

1. ONE, by marriage articles and ſettlement, had a power of diſpoſing of a reverſionary intereſt in copyhold land, (ſubject to an eſtate for life in his wife,) among the iſſue of the marriage, in ſuch ſhares and proportions, as he ſhould think fit; and for want of ſuch appointment by the huſband, then the reverſionary intereſt was to go to his right heirs. The power was directed to be executed by deed in his lifetime, or by will at his death. *He*, by *his will*, reciting the power under the articles and ſettlement, *delegated it to his wife*, that ſhe might, *in ſuch ſhares and proportions as ſhe ſhould think fit*, diſpoſe of it between his ſon and daughter; and for want of ſuch appointment, he gave it in equal ſhares between his two children. *Et per curiam*—This was to be conſidered as a *power* of attorney, which could be executed *only* by the huſband, *to whom* it was *ſolely* confined, and was *not*, in its nature, tranſmiſſible or delegatory to a third perſon; therefore the intermediate appointment to the wife, under the will was *abſolutely*

ſolutely void; and the *latter part*, where he gave it in equal ſhares between the two children, was a good appointment within the marriage articles and ſettlement. *Ingram* v. *Ingram*, 2 *Atk.* 88.

2. Where a perſonal eſtate was given to ſuch charitable uſes as *B.* ſhould appoint; a direction by *B.* that the *money* ſhould be applied *as his brother* ſhould appoint, was diſallowed by the court. *Attorney-General* v. *Berryman*, cited 2 *Veſ.* 645. See *Alexander* v. *Alexander*, (A) *ante*, S. P. with reſpect to the diſcretionary power given to *M.* and *J.* over the ſhare of *F.* See alſo *Peaſe* v. *Mead*, 5 *Vin.* 117. *pl.* 2. and ſide note.

3. So where part of the condition of a bond was for payment by *B.* of ſuch a ſum of money to ſuch perſon as *A.* ſhould by will appoint, and *A.* made her will, in which ſhe referred to a former bond given to her by *B.*, but which was afterwards cancelled, but did not at all notice the bond or the power. Then came the following diſpoſition: "And as to all the reſt, reſidue, and "remainder of my ready money, perſonal eſtate and effects "whatſoever and whereſoever, not herein before given and diſ-"poſed of, (except the ſum of 10*l.*, which I give and bequeath "to *A.*, to be paid to him by my executor immediately after my "deceaſe) I give and bequeath the ſame to *M. B.* for his own "uſe." This bequeſt being clearly held not to amount to an execution of the power, the court of *C. B.* were of opinion that, as there was no duty in the wife herſelf, the money could not paſs to her executor as her aſſignee in law, in which character only he could claim it. With reſpect to ſome caſes cited on the other ſide, where money ſo circumſtanced had been made aſſets in favour of creditors, theſe they ſaid had been decided on principles peculiar to a court of equity. *Buckland* v. *Barton*, 2 *H. Bl.* 136.

Preſcription.

27 Vin. 255. (A) [*Who.* And] *by what Names* they may preſcribe, [though they hold only at Will, *&c.*]

1. A Perſon cannot preſcribe for right of common as occupier of a meſſuage. *Engliſh* v. *Burnell*, 2 *Wilſ.* 258.

2. But an occupier of a meſſuage and lands who has common in the lord's waſte *may ſet up a cuſtom* to cut ruſhes as annexed to his right of common. *Bean* v. *Bloom*, 2 *Black. Rep.* 926. 3 *Wilſ.* 456. S. C.

3. If tenant for years pleads a preſcription in his own name, it is bad. It ought to be in the lord's, who is tenant in fee. *Smith* v. *Morris*, *Forteſc.* 340.

(D) *What* ſhall be a *good* Preſcription. Where it is *uncertain.* 17 Vin. 262.

TRESPASS againſt a ſervant of the corporation of *P.* for taking three buſhels of barley. Plea, that one *R. D.* was ſeiſed in fee of the manor of *P.*, and that he and all thoſe whoſe eſtate he had, at their own coſt time out of mind repaired, and ought to repair the quay, and had of right taken a reaſonable duty called buſhelage, *viz.* three *Wincheſter* buſhels of barley out of and for every ſhip's *cargo* of barley brought upon the ſaid quay to be exported in any ſhip. It then derives title from *R. D.* to the corporation of *P.*, and juſtifies taking under the cuſtom by their command. The preſcription being traverſed in the replication, a verdict was found in favour of it. Upon a motion in arreſt of judgment, one point made was, that the cuſtom was void for uncertainty, the word *cargo* being too general. But held *per cur.* to be good; for the word cargo is a mercantile term, and when referred to a ſhip is very intelligible, and muſt mean the whole loading. *Sargent* v. *Read*, 2 *Stra.* 1228. 1 *Wilſ.* 91. S. C.

(L) Againſt the Law of the *Land* and Common Right. 17 Vin. 268.

SPECIAL action upon the caſe: That whereas the plaintiff is ſeiſed of the rectory impropriate of *A.*, and has right of common in a certain field containing 110,000 acres, and that the defendant incloſed part of that field, whereby the plaintiff could not enjoy his common in ſo ample, &c. Defendant pleads, 1ſt, the general iſſue. 2d, A ſpecial juſtification, that he was poſſeſſed of certain land in the ſaid common field, and that it had been a cuſtom time out of mind for all thoſe who had any lands in the ſame field to incloſe as much thereof *ad libitum* as they pleaſed. Plaintiff traverſes this cuſtom, and iſſue being joined it was found for the defendant. On motion for a new trial it was held in *B. R.* that this was a good cuſtom, and in the nature of ſhack. 2d, *Per Lee*, C. J. and *Deniſon*, J. *In an action upon the caſe*, this cuſtom might be given in evidence upon the general iſſue; for it proves the defendant not guilty of the *gravamen* laid in the plaintiff's declaration. *Barber* v. *Dixon*, 1 *Wilſ.* 44.

(T) *Deſtruction.* What may deſtroy it. 17 Vin. 277.

1. AN ancient grant without date (as of common of paſture) does not neceſſarily deſtroy a preſcriptive right to the ſame thing; for it may be either prior to time of memory, or in confirmation of a prior right, and it ought to be left to the jury

whether either of theſe is the caſe. *Addington* v. *Clode*, 2 *Black. Rep.* 989.

2. On an information for ſtopping up a common footway, the proſecutor proved that it had been a common paſſage as far back as any witneſſes could remember. But defendant produced a leaſe of the way for 56 years, that it might be a paſſage during that time, and that the term was expired. *Raymond*, C. J. held defendant not guilty; and that leaving it open 4 or 5 years after the expiration of the leaſe will not amount to a gift to the public. *Rex* v. *Hudſon*, 2 *Stra.* 909.

17 Vin. 283.

(Y) Pleadings.

1. TRESPASS founded upon a preſcriptive right of burial of any perſon dying in plaintiff's houſe at *O.*, in the chancel of the church of *O.*, in the exerciſe of which defendants diſturbed him. A caſe being reſerved at *niſi prius*, it ſtated, that the plaintiff had ſuch preſcriptive right, and that defendants *did* diſturb him in burying, *&c. and were wrong-doers*: but it was alſo ſtated that 2*s.* was due to the pariſh of *O.* for every perſon buried in the chancel of that church. Held *per cur.*, that where a perſon claims a ſervitude upon another's property, he muſt lay and prove the whole of it againſt the owner. But in an action againſt a wrong-doer, as is the preſent caſe, it is only neceſſary to ſet out the right, in the enjoyment of which plaintiff was diſturbed. 2d, The right in the churchwardens to the 2*s.* for every burial is not part of this preſcription, but either a cuſtomary payment, or at leaſt a collateral preſcription. *Waring* v. *Griffiths & al.*, 1 *Burr*, 440.

2. A plea of preſcription for common in a *que eſtate* is good after verdict, though it be not in *expreſs* terms alleged that the owners of the eſtate have uſed it from time immemorial. *Clarke* v. *King & al.*, 3 *Term Rep.* 147. *Vide Addington* v. *Clode*, 2 *Black.* 990.

3. If to an action of treſpaſs in the common called *A.* the defendant plead that *A.* and *B.* commons lie open to each other, and then preſcribe for a right in both commons, the plaintiff muſt traverſe the whole preſcription. *Morewood* v. *Wood & al.*, 4 *Term Rep.* 157.

4. Replevin. Avowry that defendants were *owners and occupiers* of certain meſſuages, and preſcribe for common in the *locus in quo* as ſuch, and avow damage feaſant. Verdict for defendant. Upon motion in arreſt of judgment this was held bad; for confeſſedly it is bad where it would be neceſſary to ſet forth a title. And though in treſpaſs there is no occaſion to ſet forth a title againſt a ſtranger, yet in replevin it is different, becauſe the avowant being to have a return of the cattle muſt ſhew a title *in omnibus*. *Engliſh* v. *Burnell & al.*, C. B., 2 *Wilſ.* 258.

Preſentation, Parſon, Patron. [A]

(G) The Intereſt of the Parſon in the Church and Church Yard. 17 Vin. 301

1. WHERE a lecturer has uſually been appointed by a pariſh, but there is no certain cuſtom as to the election, nor any fixed ſtipend, the court will not compel one to be licenſed by the biſhop when another has been admitted by the rector; for the rector might refuſe him the pulpit, the fee being in him. *The King* v. *The Biſhop of London*, 1 *Wilſ.* 15. S. C. 2 *Stra.* 1192.

2. Nothing is ſo clear as that no man can be a lecturer and uſe the pulpit of the rector without his conſent. But if there has been an immemorial uſage, the law ſuppoſes there was a good foundation for it. If the lectureſhip be endowed, that affords a ſtrong argument to ſupport the cuſtom. *The King* v. *The Biſhop of London*, 1 *Term Rep.* 333. S. P. *The King* v. *Field*, 4 *Term Rep.* 125.

(I) Power of the Parſon, Patron, and Ordinary, jointly.

THERE have been caſes ſince the diſabling ſtatutes where decrees have been made confirming compoſitions relating to the rights of the church, which have been made by the parſon, patron, and ordinary, where it has been for the benefit of the church. *Douglas* v. *Vane*, 1 *Wilſ.* 128.

(P) Chapel.

1. A Bill in equity lies in the name of a chaplain or curate to eſtabliſh his right; but not an information in the name of the attorney-general, unleſs for charities, as augmentations of vicarages are. *Brereton* v. *Tamberlane*, 2 *Veſ.* 425.

2. The right of baptiſm, burial, and divine ſervice in a chapelry, and the circumſtance of the inhabitants of the chapelry not having thoſe rights in the pariſh-church, nor being rateable to it, are evidence of a perpetual curacy or chapelry; whereas, chapels of eaſe have no parochial rights, and the inhabitants are not exempt from contributing to the mother church, and ſuch chapelries are determinable *ad libitum*. *Ibid.*

3. The ſmall tithes and ſurplice fees having been always enjoyed by the curate, and his having received an augmentation under 29 *Car.* 2. *c.* 8. are evidence of a perpetual curacy. *Ibid.*

4. There are ſeveral inſtances in the kingdom of an union of pariſhes, where one is conſidered as the pariſh church, the other is kept up as a parochial chapel for the convenience of the inhabitants; a chapel having parochial rights, and the preſentation to the pariſh church always being *cum capella annexa*, are evidence of this ſpecies of union; and in ſuch caſe the right of nomination ſhall be preſumed to be in the vicar of the pariſh church, who has the general cure of ſouls, rather than in the rector; and may be by parol. *Per* Lord *Hardwicke. Ibid.*

5. Where there is a pariſh of which the cure of ſouls is in a chaplain or curate, the miniſter's having from time to time attended the viſitations of the biſhop, is evidence of its being a preſentative perpetual curacy, and not a donative, and therefore a licence is neceſſary to complete the title of an incumbent. *Powell* v. *Milbank*, 1 *Term Rep.* 399. (*note.*)

6. On a commiſſion of charitable uſes, it was agreed between the lord of the manor of *A.* and the inhabitants of *W.* within the manor, that certain copyhold lands ſhould be let for the maintenance of a ſtipendiary curate of the chapel of *W.* to be nominated by a majority of the inhabitants, and to be allowed by the lord, and by him preſented to the ordinary for a licence to preach, and the uſage had been accordingly; the lord having refuſed to preſent the nominee of the majority of the inhabitants, the latter prayed a *mandamus*, which the court refuſed; for their right is either a mere truſt, and then their relief is in equity; or it is a legal right, and then a *quare impedit* will lie; for where the preſentation and nomination are in ſeveral, and either impedes the other in his right, *quare impedit* lies. In ſuch caſe the perſon having the right of preſenting is to judge of the qualification of the perſon nominated, in the ſame manner as the biſhop does; but if he object on the ground of immorality, that muſt be tried by a jury. *The King* v. *The Marquis of Stafford*, 3 *Term Rep.* 646.

7. A *mandamus* to a biſhop to licenſe a curate of an augmented curacy was refuſed, becauſe the party had another ſpecific remedy by *quare impedit*. *The King* v. *The Biſhop of Cheſter*, 1 *Term Rep.* 396.

17 Vin. 311. (Q) Spiritual Promotion, what ſhall be ſaid to be.

IN a title for holy orders, the undertaking of the rector to continue his curate till he ſhall be otherwiſe provided with ſome *eccleſiaſtical preferment*, is not diſcharged by the curate's accepting the *readerſhip* in the ſame pariſh; for the readerſhip is determinable at pleaſure, and may be exerciſed by a layman. *Martyn* v. *Hynd*, *Dougl.* 146.

(R) Donative.

IN the caſe of a *preſentative* benefice the patron has his private intereſt and right of preſentation, the ordinary has the right of admiſſion, inſtitution, and induction of the clerk. In the caſe of a *donative*, both the public and private act to be done are in the donor: nothing is in the biſhop. But ſtill a donative, eſpecially with cure of ſouls, has all the properties of eccleſiaſtical benefices. The incumbent muſt be 23 years of age; in deacon's orders; muſt ſubſcribe and read the 39 articles; muſt read the Common Prayer; and take the oaths of allegiance and ſupremacy; for theſe are not againſt the right of the donor; they are checks on the political tenets of the incumbents, as the biſhop has juriſdiction over their moral characters. *Powell* v. *Milburn*, 3 *Wilſ.* 365.

(D. a) In what Caſes the King ſhall preſent.

17 Vin. 319.

1. WHERE the incumbent of a living was promoted to a biſhoprick, and died before a preſentation by the crown, it was held by the court of King's Bench, and by all the judges, that the king might preſent notwithſtanding his death; but the houſe of lords reverſed the judgment; it is uncertain upon what grounds. *Rex* v. *Archbiſhop of Armagh*, 2 *Stra.* 837.

2. A *commendam capere* amounts to a preſentation by the crown, but not a *commendam retinere*. *Rex* v. *Epiſc. Landaff*, 2 *Stra.* 1011.

3. Where there are three patrons having right of preſentation in their turns, the prerogative preſentation, on promoting the incumbent to a biſhoprick, ſhall not be conſidered as the turn of any of the patrons. *The Grocers' Company of London* v. *the Archbiſhop of Canterbury*, 3 *Wilſ.* 221.

(G. a) By Coparceners, Tenants in Common, or Joint-tenants.

1. WHERE the elder ſiſter had conveyed her intereſt, it was held that her aſſignee was entitled to preſent firſt in turn. *Buller* v. *the Biſhop of Exeter*, 1 *Veſ.* 340.

2. Where there are joint-tenants truſtees of an advowſon, and a clerk is preſented by a part, but the reſt refuſe their conſent, the biſhop may either refuſe or accept the preſentation. *Attorney-General* v. *Scott*, 1 *Veſ.* 414.

3. Where there is an advowſon in truſtees, and they are directed by the truſt to meet for the purpoſe of preſenting a clerk within four months after the death of the incumbent, a meeting for that purpoſe after that time is valid. *Ibid.* S. C. *Ambl.* 83.

(I. b. 3) Voidance, at what Time by Pluralities.

IT was agreed by the court that, as to lapſe, the avoidance of the former benefice does not take place till induction to the ſecond. *Biſhop of Lincoln* v. *Wolforſton*, 3 *Burr.* 1510. S. C. 1 *Black. Rep.* 490.

(Y. b) Againſt what Perſons being Patrons Lapſe ſhall incur.

THE dean and chapter of *Chicheſter* having a right to elect a canon reſidentiary, which is an office of truſt, eccleſiaſtical and temporal, with freehold tenements annexed, and having neglected to make ſuch election, the biſhop claimed a right to preſent by lapſe, by virtue of his viſitatorial authority; but a prohibition was iſſued againſt him. The court were divided in opinion whether, if the biſhop had appointed one to execute the office till the dean and chapter ſhould make an election, ſuch nomination *ad interim* would have been good. *Biſhop of Chicheſter* v. *Horwood*, 1 *Term Rep.* 650.

[G]

Privilege.

27 Vin. 510.

(B) Privilege. For what Cauſes.

1. A Party who has attended his cauſe all day in court, and in the evening retires to dine with his attorney and witneſſes at a tavern in *Palace Yard*, is privileged from arreſt, *cauſâ redeundi*. 2 *Black. Rep.* 1113.

2. If defendant returning from court to juſtify bail is arreſted, he ſhall be diſcharged. *Barnes*, 378.

3. The court refuſed to diſcharge a perſon in cuſtody by proceſs of the ſheriff's court, in a cauſe afterwards removed into *B. R.*, becauſe he was arreſted while attending commiſſioners of bankrupt to prove a debt. *Kinder* v. *Williams*, 4 *Term Rep.* 377. But *vide Kerney*'s caſe, 1 *Atk.* 54. in which a contrary principle appears to have been held.

4. All perſons who *have relation to a cauſe* which calls for their attendance in court, and who attend in the courſe of that cauſe, though not compelled by proceſs ſo to do, (ſuch as bail,) are privileged from being arreſted *eundo et redeundo*, provided their attendance

be

be not for any unfair purpoſe, ſuch as in the caſe of bail, an inſolvent perſon's attempting to juſtify. *Meekins* v. *Smith*, 1 *H. Black.* 636.

5. Attorney waiting till judge comes to attend a ſummons, and the hour expires, if arreſted, ſhall be diſcharged. *Barnes*, 378.

6. So the party to a cauſe is protected during his attendance on an arbitration under a rule of *niſi prius*. *Hetley*'s caſe in the Exchequer, *Trin.* 1788.

7. Defendantt aken in execution whilſt attending a writ of inquiry as attorney, was diſcharged. *Barnes*, 200.

8. The drawer of a bill of exchange, which becomes due, and is paid by the acceptor, after the bankruptcy of the drawers, cannot be arreſted by the acceptor during the time allowed them by ſtat. 5 *G.* 2. for attending the commiſſioners to be examined. *Darby* v. *Bangton*, 5 *Term Rep.* 209.

(D) What Perſons ſhall have the Privilege. 17 Vin. 515.

1. THE king's ſervants are privileged from arreſts, and if taken in execution, the court will diſcharge them on motion. *Bartlett* v. *Hebbes*, 5 *Term Rep.* 686.

2. This privilege extends not to capital crimes: thus defendant, appearing upon his recognizance, was arreſted in court upon a new count, upon a new warrant, for treaſonable practices. *Rex* v. *Kelly*, 1 *Stra.* 530.

3. An arreſt, within the king's palace, by an officer of the palace court, of a perſon not of the houſhold, againſt whom a writ has iſſued out of that court, though no leave to make the arreſt has been obtained from the board of Green Cloth, good, and no indictment will lie againſt the officer making it. *Rex* v. *Stobbs*, 3 *Term Rep.* 735.

4. A *volunteer* is not privileged from arreſts under an act privileging *impreſſed* men. *Turner* v. *Turner*, 1 *Burr.* 466.

5. *Engliſh* ſecretary to a foreign miniſter privileged from arreſt, though formerly a trader, and now under very ſuſpicious circumſtances. *Triquet and others* v. *Bath*, 3 *Burr.* 1478. And *vide* 7 *Ann. c.* 12.

6. Ambaſſador's domeſtic ſervant, in order to entitle him to privilege, muſt ſhew himſelf to be in ſervice at the time of the arreſt. *Heathfield* v. *Chilton*, 4 *Burr.* 2015.

7. And it has been adjudged that a defendant claiming the benefit of the act 7 *Ann. c.* 12. as domeſtic ſervant to a public miniſter, muſt be really and *bonâ fide* his ſervant at the time of the arreſt; and muſt clearly ſhew by affidavit the general nature of his ſervice, the actual performance of it, and that he was not a trader or object of the bankrupt laws. *Vide* 2 *Stra.* 797. 2 *Ld. Raym.* 1524. 1 *Wilſ.* 20. 78. 1 *Burr.* 401. 3 *Burr.* 1676.

8. *Qu.* Whether a gamekeeper to a peer be privileged from arreſt. *Cheſter* v. *Upſdale*, *B. R.* 1 *Wilſ.* 278. This privilege, extending

extending formerly to the ſervants of peers neceſſarily employed about their perſons and eſtates, ſeems to have been taken away by the ſtat. 10 *G.* 3. *c.* 50. *Vide* 5 *Term Rep.* 687.

9. By the law and cuſtom of parliament members of the Houſe of Commons (ſtat. 10 *G.* 3. *c.* 50.) are privileged from arreſt, not only during the actual ſitting of parliament, but for a convenient time ſufficient to enable them to come from and return to any part of the kingdom before the firſt meeting, and after the final diſſolution of it; and alſo for forty days after every prorogation, and before the next appointed meeting, which is now, in effect, as long as the parliament exiſts, it being ſeldom prorogued for more than *fourſcore* days at a time. 2 *Stra.* 985. 1 *Black. Com.* 165.

10. If an attorney or other officer of the King's Bench be arreſted by proceſs iſſuing out of the *ſame* court, he may move to be diſcharged on common bail. *Wheeler*'s caſe, 1 *Wilſ.* 298.

11. But if he be an attorney or officer of a different court, he muſt find ſpecial bail, and plead his privilege in abatement. *Snee* v. *Humphreys, C. B.*, 1 *Wilſ.* 306.

12. Bankrupts, having obtained their certificates, as they cannot be ſued, are not liable to be arreſted for debts contracted prior to their bankruptcy. Stat. 5 *G.* 2. *c.* 30. *ſ.* 7. 13. 2 *Stra.* 949. 1 *Atk.* 152.

13. *Inſolvent debtors* and *fugitives*, diſcharged under inſolvent acts, are not liable to be arreſted. (ſee the ſtat. 37 *G.* 3. *c.* 112.) even on ſubſequent *promiſes*, for debts contracted *prior* to the times preſcribed by the acts. 2 *Stra.* 1233. *Sed vide Drew* v. *Jefferies*, 2 *Burr.* 736. And ſee *Comp.* 549.

27 Vin. 520. ## (G) Of the Chancery [and other Courts.] In what Caſes it ſhall be granted.

1. THIS day *Harriſon*, who was deputy to Mr. *Marſham* the foreign oppoſer, was allowed his writ of privilege to exempt him from ſerving the office of conſtable. *Bunbury's Reports p.* 24. *Harriſon*'s caſe, *June* 17, 1718.

2. Officers of revenue ought to be ſued in the Exchequer for what they do in the execution of their office. *Bunbury*, 34. 1718. *Beerholt* v. *Candy*.

And the court of Exchequer will remove an action commenced in C. B. *againſt an officer for ſeizure of a ſhip, though no information for the ſhip be yet filed.* Ibid.

An information was tried, and a verdict for the defendant; the informer moved for a new trial, which was denied: an action was commenced in the Common Pleas againſt the officer for the ſeizure, and the court was moved, that it might be removed here, but denied; becauſe the officer was now out of court, and could have no protection here. 1721, in notis, Bunbury, 35.

3. The defendant's plea of privilege as an attorney of the court of King's Bench was received *per totam curiam*, after appearance by the defendant, and bail put in. *Bunbury's Reports p.* 113. 1722. *Upton* v. *Coward*.

4. Writ

4. Writ of privilege granted to the deputy of the uſher of the Cuſtoms; but denied to the chief accountant to the commiſſioners for victualling the navy. *Bunbury*, 255. 1728. *Biſhop* v. *Lloyd.*

5. Officer of cuſtoms ſeizes two cables, one whereof is only foreign, the court refuſed to remove the action of treſpaſs from *B. R. Bunbury*, 306. 1731. *Barkley* v. *Walters.*

6. An action of treſpaſs againſt a revenue officer, for his conduct in the execution of his office, may be removed from the court of Common Pleas into the office of pleas of the Court of Exchequer. 1 *Anſtr.* 205. *Trin.* 33 *G.* 3. *Anon.*

As to the privilege of the officers of the revenue of being ſued in the Exchequer, ibid.

7. A defendant arreſted by a *quo minus*, while protected by the privilege of the court of Common Pleas as a ſuitor there, may be diſcharged by either court. 3 *Anſtr.* 941. 37 *G.* 3. *Walker* v. *Webb.*

8. A party attending an arbitrator, *under an order* of the court of Chancery, is privileged from arreſt. 3 *Veſ. jun.* 350. 1797. *Moore* v. *Booth.*

9. The privilege of a bankrupt from arreſts during his examination, extends to an attachment for not paying money under an award made a rule of court. 3 *Veſ. jun.* 554. 1797. *Ex parte Parker.*

10. A detainer before a party could be diſcharged from an illegal arreſt, as where he was returning from his examination under a commiſſion of bankrupt againſt him, cannot be ſupported. 4 *Veſ. jun.* 691. 1799. *Ex parte Hawkins.*

11. Plaintiff, in his return from attending a motion againſt him in a cauſe, was arreſted and a detainer lodged againſt him in another action; he was diſcharged from both. The court examined the parties perſonally and not by affidavit. 5 *Veſ. jun.* 1799. *Bromley* v. *Holland.*

(G. 2) Allowed. How.

17 Vin. 525.

1. IN general, where the defendant is entitled to privilege, as the arreſt is irregular and unlawful, the court will diſcharge him upon motion, and not put him to the neceſſity of ſuing out a writ of privilege. 2 *Stra.* 985. 5 *Term Rep.* 689. But *vide* 1 *Wilſ.* 278.

2. But where a man is arreſted by proceſs out of the courts of *Weſtminſter*, it does not ſeem that juſtices of the peace, unleſs the arreſt is made in the ſeſſions, have power to diſcharge him. Thus, on *Tueſday* the 2d *November* 1781, application was made to the court of King's Bench for the diſcharge of one *Kelly*, who had been arreſted under the following circumſtances.—He had taken up his reſidence in the verge of the court, in order to exempt himſelf from arreſt, ſome of the officers of which contrived that he ſhould be carried to a magiſtrate out of the limits of his privilege upon

upon a peace warrant. To the charge exhibited againſt him before the juſtice Mr. *Kelly* gave bail, and was diſmiſſed with a direction to the conſtable to conduct him unmoleſted back to the verge of the court. But, notwithſtanding ſuch direction, while returning, he was apprehended by a ſheriff's officer, who impriſoned him on a civil proceſs. Mr. *Kelly* applied to be diſcharged out of cuſtody, on the ground that this arreſt was illegal; but the court refuſed to grant the motion, declaring that the preſent caſe ſtood preciſely on the ſame footing with an arreſt within the verge of the court, without an order of the board of Green Cloth, and that the party muſt reſort to his remedy againſt the officers for infringing the privileges of that board, but that they could not diſcharge him.

[G]

Proceſs.

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87 Vin. 536. ## (B) Diſtringas. Diſtringas upon Teſtatum at the Common Law.

1. IT is in the diſcretion of the court to put a defendant under terms, who moves to have the iſſues under ſeveral *diſtringaſes* reſtored to him on his appearance according to ſtat. 10 *G.* 3. *c.* 50. *ſ.* 4. *Cazalet* v. *Dubois*, 1 *Boſ. & Pul.* 81.

2. Coſts of iſſuing writs of *diſtringas* under ſtat. 10 *G.* 3. *c.* 50. to be paid before appearance, though no iſſues levied. *Martin* v. *Townſhend and Sawbridge*, 5 *Burr.* 2725.

3. By the above-mentioned ſtat. 10 *G.* 3. *c.* 50. "for the further preventing delays of juſtice by reaſon of the privilege of "parliament," it is enacted, "That the proceſs of *diſtringas* is "dilatory and expenſive;" for remedy whereof it enacts (*ſ.* 4.) "That the court, out of which the writ proceeds, may order the "iſſues levied from time to time to be *ſold*, and the money ariſing "thereby to be applied to pay ſuch coſts to the plaintiff as the "ſaid court ſhall think juſt, under all the circumſtances, to order; "and the ſurplus to be retained until the defendant ſhall have "appeared, or other purpoſe of the writ be anſwered." With a proviſo, that "when the purpoſe of the writ is anſwered, then "the ſaid iſſues ſhall be returned; or if ſold, what ſhall remain of "the money ariſing by ſuch ſale, ſhall be repaid to the party diſ-"trained upon."

4. The above-cited ſtatute has been conſtrued to extend to all writs of *diſtringas*, and not to be confined to ſuch as concern privilege of parliament only. *Raban* v. *Plaiſtow*, 5 *Burr.* 2726.

5. Defendant, before the action commenced, quitted the kingdom, leaving his mother in poſſeſſion of his houſe and goods; plaintiff having ſerved a ſummons to appear at the houſe, diſtrained the goods to compel an appearance, and on an application to the court that the levy ſhould be reſtored, the proceedings were holden regular. *Staines* v. *Johannot*, 1 *Boſ. & Pul. Rep.* 200.

6. It is ordered, that in all writs of *diſtringas*, returnable on the laſt day of term, the plaintiff ſhall be at liberty at the riſing of the court to move to increaſe iſſues on the *alias* or *pluries diſtringas*, to be iſſued thereupon on the following day, in caſe no appearance ſhall then have been entered. And alſo that in like caſes where a *diſtringas* ſhall be returnable on the laſt day of term, and iſſues thereupon levied, the plaintiff ſhall be at liberty, at the riſing of the court, to move for leave to ſell ſuch iſſues to pay the coſts of ſuch *diſtringas* or *diſtringaſes*. *Reg. Gen. C. P. T.* 38 *G.* 3. 1 *Boſ. & Pul.* 312.

(G) At what Time Proceſs may be executed. 17 Vin. 539.

1. FORMERLY a copy of the proceſs muſt have been ſerved on the defendant *before* the return day, but now it is holden that ſervice, at any time after the riſing of the court *on* the return day, is ſufficient. 2 *Burr.* 812. 1 *Term Rep.* 192.

2. The *cuſtos brevium* is to endorſe on every writ on what day and at what time it is filed. *Reg. Gen. T.* 33 *G.* 3. 3 *Term Rep.* 787.

3. It is irregular if a *capias* be ſerved after the date of the return, and if there be not 15 days between the *teſte* and return. *Whale* v. *Fuller*, 1 *H. Bl.* 222. But if the defendant take the declaration out of the office, he thereby waves all preceding irregularity. *Ibid.*

4. If a defendant be arreſted after the writ is returnable, the officer cannot legally detain him (though for the ſhorteſt time) until the writ be continued. *Loveridge* v. *Plaiſtow*, 2 *H. Bl.* 29.

5. Service of a *latitat* at *eight* o'clock in the evening of the return day is good, though the declaration be left in the office in the courſe of the ſame day. *Robertſon* v. *Douglas*, 1 *Term Rep.* 192.

6. So, in the caſe of *Ward* v. *Wilkinſon*, the court refuſed to ſet aſide the proceedings, though the notice of declaration was not ſerved till half after ten at night. 1 *Term Rep.* 192. (*a*).

7. Service of notice of declaration on a *Sunday* is bad, though the defendant accept it knowing it to be irregular. *Morgan* v. *Johnſon*, 1 *H. Black.* 628.

8. A defendant muſt not be ſerved with proceſs whilſt he is attending at any of the courts at *Weſtminſter*. 2 *Stra.* 1094.

9. Service of meſne proceſs on the return day is good in *C. B.* at well as in *B. R. Gen. R. P.* 8 *G.* 3. 2 *Wilſ.* 372.

10. Where a writ is returnable on a *Sunday*, it muſt be executed at lateſt on the *Saturday*; and where a defendant in ſuch caſe

was

was arreſted on *Monday* morning, and detained till the writ was renewed, the arreſt was held illegal. *Loveridge* v. *Plaiſtow*, 2 *H. Black.* 29.

27 Vin. 540.

(H) Who may execute it.

1. IN particular franchiſes and juriſdictions, the proper officer there ſhould execute the proceſs. *Stat.* 5 *G.* 2. *c.* 27. *ſ.* 3.

2. Service is good, though in a liberty, and not by a proper officer: but the party injured may bring his action. *Barnes*, 404.

3. Proceſs directed to the ſheriff of *Kent* ſerved in the *Cinque Ports*, is bad; it ſhould be *teſt. cap.* to the conſtable of *Dover Caſtle*. *Barnes*, 422.

4. In a *county palatine*, the ſheriff acts not by virtue of an immediate and direct authority, but by virtue of a *mandate* from the officer to whom the writ is directed; but if the writ, in ſuch caſe, be directed immediately to the ſheriff, without ſuch intervention, he is bound to execute it, and a bail bond taken on the arreſt, is legal. *Jackſon* v. *Hunter*, 6 *Term Rep.* 71.

5. Where the ſheriff having directed a warrant to *A.* and all his other officers to arreſt *B.*, *A.* afterwards inſerted therein the name of *C.*, it was holden that the warrant was illegal, and the arreſt by *C.* conſequently void. *Houſin* v. *Barrow*, 6 *Term Rep.* 122.

27 Vin. 541.

(I) What ſhall be ſaid a good Arreſt in Law.

1. AN officer to whom a warrant is intended to be directed, cannot arreſt the party before he has the warrant. If he do, the court will diſcharge the defendant out of cuſtody. *Hall* v. *Roche*, 8 *Term Rep.* 187.

2. Whether the officer be not bound to produce the warrant to the party arreſted, if it be demanded? *Ib.*

3. The officer cannot juſtify breaking open the window, or outward door; but if once in the houſe, he may break open inward doors. *Foſter*, 319, 320.

4. Only the occupier and his family, whoſe ordinary reſidence is there have this privilege. The houſe of another is not the caſtle of a ſtranger. *Ibid.*

5. A warrant of the chief juſtice of *K. B.* to arreſt a party "to the end that he may become bound, *&c.* to appear at *the* "*next ſeſſion* of *oyer* and *terminer*," *&c.* means the next ſeſſion after the arreſt, and not after the date of the warrant. Therefore the officer executing it may juſtify an arreſt even after the lapſe of ſeveral ſeſſions ſubſequent to the date of the warrant. It is not neceſſary to renew ſuch warrant every ſeſſion, if not executed before. *Mayhew* v. *Parker*, 8 *Term Rep.* 110.

6. Where *A.* was arreſted at the ſuit of *B.* and diſcharged, the ſheriff not knowing that there was alſo a detainer in his office at the

the ſuit of *C.*, and on the *Sunday* following he was arreſted at *C.*'s ſuit, the court diſcharged him out of cuſtody, conſidering the arreſt on a *Sunday* as an original taking, or as a retaking after a *voluntary* eſcape; and in either caſe it was prohibited by the ſtatute. *Barnes*, 373.

7. But after a *negligent* eſcape the defendant may be retaken on a *Sunday*, and that either by the officer upon a freſh purſuit, or by virtue of an eſcape warrant, for this is not an original taking, but the party is ſtill in cuſtody upon the old commitment. *Sir Wm. Moore's caſe*, 2 *Lord Raym.* 1028.

8. A peace officer may juſtify an arreſt on a reaſonable *charge* of felony, without a *warrant*, although it ſhould afterwards appear that no felony had been committed; but a private individual cannot. *Samuel* v. *Payne*, 1 *Dougl.* 359.

9. A bailiff who has arreſted a priſoner on *meſne proceſs* may retake him before the return of the writ, though he voluntarily permitted the priſoner to eſcape immediately after the arreſt. *Per Aſhhurſt* J.—The only difference between an arreſt on *meſne proceſs* and an *execution* is this, on the *former* the bailiff may permit the priſoner to go at large, provided he has him at the return of the writ; but in the *latter* caſe, if the bailiff voluntarily permit the priſoner to go at large, though only for a minute, he cannot afterwards retake him. *Atkiſon* v. *Mattiſon*, 2 *Term Rep.* 172.

10. If a party is arreſted in another county by a bill of *Middleſex*, the proceedings will be ſet aſide for irregularity. *Devinge* v. *Dalby*. 1 *Dougl.* 384. *Borman* v. *Bellamy*, S. P. 1 *Term Rep.* 187.

11. To make an arreſt perfectly legal there ought in the firſt place to be a warrant for apprehenſion; as in the caſe of *William Power*, who was indicted for the murder of *John Wilkiſon*, as aſſiſtant to Mr. *Parke*, an headborough ſent to take the ſaid *W. Power* into cuſtody for having been guilty of riotous behaviour, *&c.* When the judges *Wilſon* and *Groſe*, who were on the bench, concurred with Mr. J. *Gould* (who tried the priſoner) in opinion, that as the riot was over, and there was no authority from a juſtice of peace to ſeize *Power*, he was illegally arreſted, and that, where a perſon, being deprived of his liberty illegally, does an act that cauſes the death of his aſſailant, in any manner whatever, certainly in law it reduces the offence to manſlaughter. *O. B. Seſ. September* 1789.

12. Bare words will not make an arreſt, but if the bailiff touch the perſon it is an arreſt, and the retreat a reſcous. On a motion for an attachment againſt three perſons for a reſcous of a perſon taken in execution, it was objected that there had not been a legal arreſt, as the bailiff had never touched the defendant. *Per curiam*—This is a good arreſt: and if a bailiff, who has a proceſs againſt one, ſay to him, when he is on horſeback, or in a coach, "you are my priſoner, I have a writ againſt you," upon which he ſubmits, turns back, or goes with him, though the bailiff never

touched him, yet it is an arreſt, becauſe he ſubmitted to the proceſs; but if inſtead of going with the bailiff, he had gone or fled from him, it could be no arreſt, unleſs the bailiff had laid hold of him. *Horner* v. *Batton*, *B. R. Hil.* 12 *G.* 2. *Bull. Ni. Pri.* 62.

13. One who is convicted on a penal ſtatute, cannot be apprehended on a *Sunday*, for non-payment of the forfeiture, for this is a civil proceeding. It is in the nature of a *fi. fa.* when on a return of *nulla bona*, the perſon is liable when firſt a warrant is iſſued to ſeize the goods of the defendant, and for want of a diſtreſs the perſon is taken. Under the act, however, of 29 *Car.* 2. *c.* 7. *ſ.* 6. no man can be arreſted on *Sunday*, but for treaſon, felony, or a breach of the peace, and this is neither. *King* v. *Myers*, 1 *Term Rep.* 265.

14. A bailiff, in the execution of *meſne proceſs*, may break open the door of a *lodger*'s appartment, which is not to be conſidered as his *outer* door, and the ſtreet door being open, the officer has a right to force open the chamber door, the defendant being in the room, and refuſing to open it. *Lee* v. *Ganſel*, 1 *Cowp.* 1.

Pro Confeſſo.

17 Vin. 542. (A) In what Caſes a Bill may be taken *pro Confeſſo*.

1. AFTER goods, or a real eſtate, are ſeized upon a ſequeſtration for want of an anſwer, the plaintiff may ſtill proceed till he has got the bill taken *pro confeſſo*. 2 *Atk.* 21. 1739. *Davies* v. *Davies*.

2. Where there is an amended bill and no anſwer to it, the plaintiff is entitled to a decree *pro confeſſo*, abſtracted from any proceedings in the original cauſe. *Ibid. Dubit.*

3. *Whether the court can take a bill* pro confeſſo, *where an anſwer has been put in which is reported inſufficient. Quære. Ibid.*

4. If defendant demur, and the demurrer be over-ruled, and the defendant ordered to anſwer, if he refuſes, the bill may be taken *pro confeſſo*. 1 *Harr. Ch. Prac.* 8 *edit.* 276.

5. If a Quaker refuſe to put in his anſwer upon affirmation, the bill may be taken *pro confeſſo*. 1 *Harr.* 203. 8 *edit.*

6. Although a defendant has appeared and anſwered the original bill, if he cannot be found to be ſerved with a ſubpœna to anſwer the bill of revivor, plaintiff muſt proceed under 5 *G.* 2. *c.* 25. to have the bill taken *pro confeſſo*. 2 *Bro. Cha. Rep.* 127. 1786. *Henderſon* v. *Meggs*.

7. After

7. After an order that a bill be taken *pro confeſſo*, merely putting in an anſwer, is not ſufficient to ſet aſide the order. 2 *Bro. Cha. Rep.* 279. 1787. *Williams* v. *Thompſon.*

8. Bill for an account taken *pro confeſſo* againſt ſurviving executor and deviſee in truſt. 3 *Veſ. jun.* 22. 1795. *Shaw* v. *Wright.*

9. Information decreed to be taken *pro confeſſo* upon two inſufficient anſwers. 3 *Veſ. jun.* 209. 1796. *Attorney-General* v. *Young.*

10. Where there is only one defendant, after all the proceſs of contempt for want of an anſwer, the bill may be ordered to be taken *pro confeſſo* upon motion. 3 *Veſ. jun.* 372. 1797. *Seagrave* v. *Edwards.*

11. The Maſter of the Rolls refuſed to make an order upon the 5 *G.* 2. *c.* 25. for the purpoſe of having the bill taken *pro confeſſo*, without an affidavit, according to the 8th ſection, that the defendant had been in *England* within two years before the ſubpœna iſſued. 5 *Veſ. jun.* 1. 1799. *Neale* v. *Morris.*

12. To obtain an order for taking the bill *pro confeſſo* under the *ſtat.* the affidavit muſt ſtate that the defendant has been in *England* within two years before the ſubpœna. 5 *Veſ. jun.* 118. *Biſhop of Wincheſter* v. *Beavor.*

Prohibition. [G]

(B) Of what Things or Actions, and for what Cauſes it lies (where) the Judges (before whom the Cauſe is brought) have not any Juriſdiction. 17 Vin. 548.

1. IN all caſes where inferior courts aſſume a juriſdiction, or hold plea of a matter not properly cognizable by them, the party may ſtay their proceedings by prohibition, but ſuch prohibition can only regularly be obtained by it appearing, on oath made, that the fact did ariſe out of the juriſdiction, and that the defendant tendered a foreign plea, which was refuſed; but no affidavit is neceſſary where on the face of the declaration the matter appears to be out of the juriſdiction. *Anon.* 1 *Peere Will.* 475.

2. A motion was made for a prohibition to be directed to the ſheriff's court in *Briſtol*, on ſuggeſtion that cauſes of action ariſing out of the juriſdiction of the ſheriff's court ought not to be ſued there; and this motion was made in behalf of the defendant, in

an action, before he had appeared to ſtay proceedings in the court, who proceeded to attach his goods in the hands of a garniſhee; and the motion was oppoſed, becauſe the defendant could not pray a prohibition on ſuggeſtion of a matter which he could not plead; and as here he could not plead this before performance, ſo he ought not to make ſuch a motion before appearance. And *per Holt* C. J.—A man ſhall not plead to the juriſdiction until he appear; but if the original cauſe of action aroſe out of the juriſdiction of the court, the garniſhee may plead it; but if it were debt on a ſimple contract, it is attachable where the perſon of the debtor is. *Cook* v. *Licenſe*, 1 *Lord Raym.* 346.

3. A prohibition will be granted to a court of appeal where it appears that they have no juriſdiction over the ſubject-matter, even after they have remitted the ſuit to the court below, and awarded coſts againſt the appellant, and though the party applying for a prohibition appealed to that court. *Darby* v. *Cozens*, 1 *Term Rep.* 552.

4. Where the ſubject of a ſuit in an inferior court is within the juriſdiction of that court, though in the proceeding a matter be ſtated which is out of its juriſdiction, yet, unleſs it is going on *to try* ſuch matter, a prohibition will not lie. *Dutens* v. *Robſon*, 1 *H. Black.* 100.

5. Courts martial, courts of admiralty, and courts of prize, are all liable to the controlling authority of the courts at *Weſtminſter*; the general ground of prohibition being an exceſs of juriſdiction when they aſſume a power in matters not within their cognizance, or act contrary to the rules of an act of parliament made to limit their authority. That they have decided wrong, or that there is error in their proceedings, may be ground of appeal or review, but not of prohibition, there being no ground for the interference of the courts at *Weſtminſter* where the matter is clearly within the juriſdiction of ſuch inferior courts. 2 *H. Black.* 100, 101. 107.

6. *Quære.* Whether the miſinterpretation of a ſtatute by an inferior court, the conſideration of which ariſes incidentally in the courſe of a proceeding which is confeſſed to be within its juriſdiction, be a ground for a prohibition? Whether it be not rather a matter of appeal? But clearly in ſuch a caſe a prohibition will not lie, unleſs it be made appear to the ſuperior court, that the party applying for the prohibition, has, in the courſe of the proceedings in the inferior court, alleged a ground for a contrary interpretation of the ſtatute on which he applies for the prohibition, and that inferior court has proceeded notwithſtanding ſuch allegation. 2 *H. Black.* 533.

7. Where the inferior court has cognizance of part of the charge, though not of the reſt, the court of *B. R.* will not grant a prohibition. *Carſlake* v. *Mapledoram*, 2 *Term Rep.* 473.

8. Prohibition ſhall go to the admiralty in a ſuit for the wages of the maſter of a ſhip. *Day* v. *Snelgrove*, 1 *Com. Rep.* 74.

9. If

9. If the defence ſtated on the proceedings below is ſuch, as, if true, ouſts the inferior court of its juriſdiction, (as where the party ſets up a *modus* in anſwer to a ſuit for tithes) although there has been an interlocutory ſentence in favour of the parſon, and, on an appeal, that ſentence has been confirmed, and coſts awarded, the party ſued may have a prohibition both to the original court, and to the court of appeal, to ſtay execution for the coſts. *Darby* v. *Cozens*, 1 *Term Rep.* 552.

10. The court will grant a prohibition of the proctor or other officer of the ſpiritual court to ſue there for his fees. *Pearſon* v. *Campion*, 2 *Dougl.* 629.

11. The court of *B. R.* granted a prohibition to ſtay a ſuit in the ſpiritual court for breaking open a cheſt in the church, and taking away the title deeds to the advowſon, becauſe only an action of treſpaſs or trover could be maintained in the temporal courts for the recovery thereof. *Gardner* v. *Parker*, 4 *Term Rep.* 351.

12. Prohibition lies, if executor libels for taking a thing without his conſent, which defendant pretends was *donatio mortis cauſa*, for it may be tried by an action of *trover*. *Thompſon* v. *Batty*, *Stra.* 777.

13. If there be a ſuit for removing a pariſh clerk, and puniſhing him for immoralities puniſhable by the temporal laws, there may be a prohibition as to all but the deprivation, but not as to that. *Townſend* v. *Thorpe*, 1 *Stra.* 776.

14. If a man libels for tithes in kind, and defendant inſiſts on a *modus*, but permits the ſpiritual court to proceed to ſentence, he is too late to apply for a prohibition. *Offey* v. *Whitehall*, *Mich.* 1717, *in Sc. Bunb.* 17.

15. If eccleſiaſtical court refuſes a plea of parol agreement with the agent of the impropriator for purchaſe of the tithes, the corn being then ſevered, prohibition goes. *Chave* v. *Calmel*, 3 *Burr.* 1873.

16. If a *modus* is pleaded to a libel for tithes by the vicar, and the defendant applies for a prohibition, on a ſuggeſtion that the tithes are due to the impropriator, yet, if it appears that they are examining witneſſes below to the *modus*, prohibition ſhall go. *Hood* v. *Hebden*, 3 *Bur.* 203.

17 Vin. 550.

(C) Juriſdiction ſpiritual.

1. THE general grounds of a prohibition to the eccleſiaſtical court are either a defect in the juriſdiction, or a defect in the mode of trial. If any fact be pleaded in the court below, and the parties are at iſſue, that court has no juriſdiction to try it, becauſe it cannot proceed according to the rules of the common law, and in ſuch caſe a prohibition lies. Or where the ſpiritual court has no original juriſdiction, a prohibition may be granted, even after ſentence. But where it has juriſdiction, and gives a wrong judgment, it is the ſubject-matter of appeal, and not of prohibition. *Per* Lord *Kenyon*. *Leman* v. *Goulty*, 3 *Term Rep.* 4. And *Vide* 2 *Burr.* 813.

2. The ſpiritual court may compel the churchwardens to deliver in their account, but cannot decide on the propriety of the charges. Therefore if they take any ſtep after the accounts are delivered in, it is an exceſs of juriſdiction, for which a prohibition will be granted, even after ſentence. *Ibid.* 3 *Term Rep.* 4.

3. Where a *modus* is pleaded in an eccleſiaſtical court, a prohibition may be granted any time before final ſentence. *Darby* v. *Cozens*, 1 *Term Rep.* 552.

4. Prohibition to the ſpiritual court to try proceedings for reſtoring a pariſh clerk, ſhall be granted: for the *office* and *fees* are of temporal cognizance. *Tarrant* v. *Haxby*, 1 *Burr.* 367.

5. Prohibition to the ſpiritual court granted (even after affirmance upon appeal) againſt a decree for a *creditor*, who had cited an adminiſtratrix to bring in an inventory, and (it being brought in) had objected to it. The court held the *ſpiritual court* to have *no juriſdiction*. *Catchoide, Widow, &c.* v. *Ovington*, 3 *Burr.* 1922.

6. Prohibition denied after ſentence, where the defendant below had ſet up ſeveral cuſtoms reſpecting *tithes*, but had ſubmitted to *trial*. *Full* v. *Hutchins, Clerk*, 2 *Cowp.* 424.

7. Where a matter is properly triable at common law, *prohibition* lies *before* ſentence. But if a party ſubmit to trial, it is afterwards too late. *Ibid.*

8. Prohibition lies *after ſentence*, if the eccleſiaſtical court has no cognizance of the cauſe, otherwiſe if there be only a *defect of trial*. *Ibid.*

9. In the vacation time, one may reſort to the Chancery, and, upon a ſuggeſtion that the ſpiritual court has proceeded to grant adminiſtration to a wrong perſon, may have a prohibition out of that court into *B. R.* or *C. B.* *Per Holt* C. J. *Blackborough* v. *Davis*, 1 *P. Wms.* 43. 476.

10. Where the queſtion is, whether the rector or vicar be entitled to tithes, no prohibition lies. *Drake* v. *Taylor*, 1 *Stra.* 87.

11. Prohibition to a ſuit in the ſpiritual court, for marrying without banns or licence, ſince the ſtat. 22 *G.* 2. *c.* 33. *ſ.* 8. by which it is made felony. *Campbell* v. *Aldrich, C. B.* 2 *Wilſ.* 79.

12. Where

12. Where the right to tithes is admitted, and a queſtion ariſes between the rector and vicar, to whom they are payable; that queſtion is triable in the ſpiritual court, and conſequently the common law courts will not grant a prohibition. *Cheeſman* v. *Hoby*, *Willes' Rep.* 680.

13. Whether or not the ſpiritual court has juriſdiction over a cauſe depends not on the parties being eccleſiaſtical perſons, but on the nature of the queſtion in diſpute. *Ibid.*

14. Where there is a legacy to the executor, the ſpiritual court cannot entertain a ſuit for diſtribution of the ſurplus among the next of kin under the ſtatute. *Hatten* v. *Hatten*, 2 *Stra.* 865. *Edwards* v. *Freeman*, 2 *P. Wms.* 441.

(G) For Seats in the Church. 17 Vin. 570.

1. IF one has a preſcription to have a ſeat in a church, and the ſeats are pulled down without his conſent, and new ones built by the ordinary on part of the place where the old one was, though he have as much ſeat as he had before, only not in the ſame place, it is illegal, and, if the ſpiritual court interpoſe, prohibition lies. *Archer* v. *Sweetnam*, *Hil.* 11 *G.* 1.

2. If there are *reciprocal* preſcriptions to a ſeat in a church, prohibition lies; for they adjudge one to be good. *Paxton* v. *Knight*, 1 *Burr.* 312.

3. One was ſued in the ſpiritual court for diſturbing a perſon in his ſeat in the church, and now ſuggeſted for a prohibition that he purchaſed an ancient houſe with this ſeat belonging to it, to him and his heirs, which was pleaded below. *Per cur:* This is enough to ſhew the temporal right is in queſtion; and a prohibition was awarded. *Wicker* v. *Chelſham*, 1 *Wilſ.* 17.

(K) Juriſdiction. Reparation. Ornaments. 17 Vin. 580.

1. PROHIBITION ſhall not be granted where it will not be *material*. As to ſtop the prerogative court from proceeding to grant a faculty for an organ in the church. *Butterworth* v. *Walker*, 3 *Burr.* 1689.

2. The conſent of the pariſh is not neceſſary to the ordinary on the eccleſiaſtical court's ordering an organ to be erected in the church. But the pariſh cannot be charged with the expence, nor with the *repair*, or with any *new ornaments*, without their conſent. *Ibid.*

3. No prohibition lies to a ſuit of the ordinary to deface ornaments (as arms) ſet up in a church without his conſent. *Palmer* v. *Biſhop of Exon*, 2 *Stra.* 1071.

4. The *ordinary* cannot puniſh a ſingle treſpaſs committed on the body of the church, which does not hinder the ſervice. *Binſted* v. *Collins*, *Bunb.* 229.

5. If in a diſpute before the ordinary about erecting a monument, one appeals to the arches, ſuch appeal lies, and no prohibition ſhall go. *Cart* v. *Marſh*, *Andr.* 69.

6. A prohibition was granted on a libel to charge a man to the repair of the church in reſpect of a light-houſe, after ſentence and an appeal to the delegates. *Rebow* v. *Bickerton*, *in Sc. T.* 1721. *Bunb.* 81.

7. Prohibition was moved for to the conſiſtory court of the Biſhop of *Exeter*, where the party was libelled againſt for a rate aſſeſſed by the churchwardens by cuſtom for repair of the church, as well the chancel as the nave of the church. And reſolved, 1. That the pariſhioners and not the churchwardens ought to aſſeſs the rate. 2. That the parſon ought to repair the chancel, and not the pariſhioners, but that the pariſhioners ought to repair the nave of the church. And, by *Holt*, C. J., by the canon law the parſon ought to repair the whole; but by the cuſtom of *England*, the parſon ſhall repair the chancel, and the pariſhioners the nave of the church. And by the cuſtom of *London*, the pariſhioners ſhall repair the chancel alſo. But *Rokeby*, J. was of opinion, that the pariſhioners ought to contribute to the charge of the ornaments of the chancel; but *Holt* doubted of that. Then it was moved, that a prohibition ſhould be granted only *quoad* the ſuit for the rate for the chancel: but reſolved, that the prohibition ſhall be for the whole, becauſe it is but one rate and entire; but if a man libel for two diſtinct things, the one of which is of eccleſiaſtical cognizance, and the other not, a prohibition ſhall be granted, *quoad* that which is of temporal cognizance, and they of the court chriſtian ſhall proceed for the other. Therefore in the principal caſe a prohibition was granted. *Penſe* v. *Prouſe*, 1 *Ld. Raym.* 59.

8. Prohibition does not lie to a ſuit in the eccleſiaſtical court againſt a Quaker for repairs of the church on ſtat. 7 & 8 *W.* 3. *c.* 34. though the act gives a remedy before juſtices of the peace, for the old remedy is not taken away: nor in the caſe of ſmall tithes under ſtat. 7 & 8 *W.* 3. *c.* 6. *Fort.* 347.

27 Vin. 588.

(N) *What ſhall be ſaid a Defamation ſpiritual* to maintain a Suit in the Eccleſiaſtical Court.

1. A Prohibition was moved for to a ſuit in the ſpiritual court for calling a woman *jilt and ſtrumpet*; and denied, for *per cur.*, they are charges of incontinence, and the ſignification of them well known. *Ferguſon* v. *Cuthbert*, *Stra.* 822.

2. Libel in the ſpiritual court for theſe words, "*Moll Winter* is a whore and a common whore, and plyer in a bawdy-houſe." Prohibition moved for and refuſed after ſentence. *Head* v. *Winter*.

3. If motion and rule to ſhew cauſe be before ſentence given below for calling a woman whore, in *London*, but rule not ſerved till

till after ſentence, prohibition ſhall not go. *Selby* v. *York*, *Trin.* 10 & 11 *G.* 2. *Note*, This is ſaid to have been ruled on another point alſo, *viz.* That in the recital of the libel in the ſuggeſtion, the words are ſaid to be ſpoken in the pariſh of *Saint* B. *in* London, *or in parts near adjacent*; if it had appeared by the proceedings or by affidavit, (which was now too late) to be in *London*, prohibition ought to ſtand, for the ſpiritual judge had no juriſdiction. *Sarby and Wife* v. *York*, *Andr.* 7. (*a*).

(*a*) N. B. This is contrary to the caſe of Argyle v. Hunt, 1 Stra. 187. and Cook v. Wingfield, Ibid. 555. where prohibition was denied for the word *whore*, though it appeared on the face of the proceedings to be ſpoken in London.

4. To ſupport prohibition to the conſiſtory court of *London* for calling *whore* in *London*, there muſt be affidavit of cuſtom, and that the word was ſpoken there. *Theyer* v. *Eaſtwick*, 4 *Burr.* 2032.

5. When ſcandalous words are ſpoken of the function of a ſpiritual perſon a prohibition ſhall not go. *Anon.* 1 *Com.* 25.

6. Words which do not directly charge the party with being a whore are not ſuch whereon the juriſdiction of the ſpiritual court ought to be diſallowed. *Steward* v. *Allen*, 1 *Com.* 235.

7. Prohibition ſhall be granted to the ſpiritual court where a libel is for words ſpoken of a clergyman which are actionable at common law. *Hall* v. *Downes*, in *C. B.* 2 *Com.* 308.

8. No prohibition lies for the words, *You are a bawd*, for it is not a charge of keeping a *bawdy-houſe*, which is puniſhable as a temporal offence. *Lockey* v. *Dangerfield*, 2 *Stra.* 1099.

9. Theſe words ſpoken of a woman, "I have kept her company theſe ſeven years; ſhe *hath* given me the bad diſorder, and three or four other gentlemen," are not actionable, becauſe they may refer to a time paſt. And no prohibition will be granted to a ſpiritual court in which a ſentence has been pronounced on a libel for this charge. *Carſlake* v. *Mapledoram*, 2 *Term Rep.* 473.

10. Where prohibition is prayed for a matter not appearing on the face of the proceedings to be out of the juriſdiction, the ſuggeſtion muſt be verified by affidavit: therefore though there is a cuſtom, and that cuſtom verified by affidavit, that whore, and calling a woman *whore*, is puniſhable at *Briſtol* by the common law, yet if there is not an affidavit that the words were ſpoken in *Briſtol*, prohibition ſhall not go. *Hinds* v. *Thompſon*, *Andr.* 299. *Driver* v. *Driver*, *ibid.* 304.

11. Yet a rule was granted to ſhew cauſe, why prohibition ſhould not go for calling a woman *ſtrumpet* in *Briſtol*, though there was no affidavit of the cuſtom. *Power* v. *Shaw*, 1 *Wilſ.* 62.

18 Vin. 38. (D. a. 2) Proceedings. What muſt be done in order to get a Prohibition.

1. THERE muſt be an affidavit that the copy of the libel is a true one. *Barnes*, 427.

2. If a civilian cannot be got to argue for it, none ſhall be heard againſt it. *Barnes*, 428.

3. If the eccleſiaſtical court clearly appears to have juriſdiction, and have pronounced ſentence, the court will not even grant a rule to ſhew cauſe. *Symes* v. *Symes*, 2 *Burr.* 813.

4. Where there is no *defectus juriſdictionis*, but only *triationis*, the defendant muſt plead it below, and have his plea diſallowed, before he can be entitled to a prohibition. *Buller's N. P.* 219.

5. Where a perſon is ſued in the eccleſiaſtical court for a ſeat in the church, if he would obtain a prohibition and ouſt the ordinary juriſdiction, he muſt ſhew ſuch a legal title as can be tried in the eccleſiaſtical court, which can only be by preſcription; and preſcription can in ſuch caſe be no otherwiſe proved than by ſhewing repairs. *Buller's N. P.* 219.

6. Where the matter ſuggeſted for a prohibition appears, on the face of the libel, to be out of the juriſdiction of the inferior court, an affidavit of the truth of the ſuggeſtion is never inſiſted on; but if it does not appear on the face of the libel, or if a prohibition is moved for, for more than appears on the face of the libel, to be out of their juriſdiction, there ought to be an affidavit. 1 *P. Wms.* 477. *Andr.* 304.

7. On moving for a prohibition to the ſpiritual court for refuſing a plea, the party ought to offer an affidavit of the truth of the facts in the plea. *Burdett* v. *Newell*, 2 *Ld. Raym.* 1211.

18 Vin. 44. (F. a. 2) *Writs*, *Declarations*, *&c.* in Prohibitions, and Rules concerning them.

1. UPON ſhewing cauſe againſt a prohibition, the court made the rule abſolute, with a direction that the plaintiff ſhould declare in prohibition: he tendered a declaration, but the defendant refuſed it, and he applied to ſtay proceedings, as being willing to ſubmit. The other inſiſted he had a right to go on, and ſo get at the coſts of the motion, which he could not otherwiſe have. But the court ſtayed the proceedings without coſts; ſaying, the direction to declare was in favour of the defendant, who might waive it. *Gegg* v. *Jones*, 2 *Stra.* 1149.

2. Leave to declare in prohibition will be granted only when the court inclines to prohibit, not when it inclines to the contrary. *Le Caux* v. *Eden*, 2 *Dougl.* 620.

3. The party applying for a prohibition has no right to inſiſt on declaring, when the court is ſatisfied that his application is groundleſs,

leſs, but the *defendant* in prohibition may, when the opinion of the court is againſt him. 1 *Burr.* 198.

4. Where an iſſue is joined on a declaration in prohibition, if the jury find a verdict for the plaintiff, yet they ſhall give no more than 1*s.* damages, for it is in nature of an iſſue to inform the conſcience of the court; but after he has had judgment, *quod ſtet prohibitio*, he may bring his action upon the caſe, and recover the damages he has ſuſtained. *Carter* v. *Leeds*, *Mich.* 2 *G.* 2. *Buller N. P.* 219.

5. Preſcription for a ſeat in a church. In declaration in prohibition the plaintiff ought regularly to ſet out a cuſtom of repairing, (which is requiſite to ſupport the preſcription,) but if he do not, if the defendant does not demur, but goes to trial, it will be aided by the verdict, for the plaintiff ought not to have a verdict unleſs he prove a cuſtom to repair. *Stedman* v. *Hay*, 1 *Comyns*, 366.

6. If a *modus* be not proved as laid by the plaintiff in a ſuit in prohibition, there muſt be a verdict for the defendant; but if any *modus* be found, though different from that laid, there is a ground for the court to refuſe a conſultation. *Brook* v. *Richardſon*, 1 *Term Rep.* 427.

7. If the iſſue lies on the plaintiff, who does not appear at the trial, he muſt be called and nonſuited; and if defendant put in his record, enter into his proof, has a verdict and judgment, it is irregular, and ſhall be ſet aſide. *Gardner* v. *Davis*, 1 *Wilſ.* 300.

(O. a. 2) Contempts to Prohibitions. Puniſhed how and where, and Pleadings. 18 Vin. 58.

IN prohibition, the contempt is but form, and the jury need not give any verdict about it. *Stratford* v. *Neale*, 1 *Stra.* 482.

(P. a) Conſultation. In what Caſes it ſhall be granted. 18 Vin. 60.

1. THE marriage of a man with his firſt wife's mother's ſiſter is within the Levitical degree, and prohibited, and a conſultation awarded. *Bunb.* 145.

2. If prohibition is granted on ſuggeſtion of a cuſtom, and on iſſue joined the cuſtom is found, but the court, on motion in arreſt of judgment, find the cuſtom ill, a conſultation ſhall go. *Dent* v. *Coates*, 2 *Stra.* 1145.

3. If plaintiff in prohibition declares, that there is a cuſtom for the occupiers of his tenement to pay 5*s.* in lieu of tithe of corn and hay, which modus the parſon has always accepted, and verdict for plaintiff, there ſhall be no conſultation; for the *modus* is found, though it is deſcribed as a cuſtom, when ſtrictly it ſhould have been a preſcription. *Sharp* v. *Lowther*, *T.* 9 *G.* 2.

4. If

4. If a *modus* be not proved as laid by the plaintiff in a ſuit in prohibition, there muſt be a verdict for the defendant, who is entitled to coſts; but if any *modus* be found, though different from that laid, that is a ground for the court to refuſe a conſultation. *Brook* v. *Richardſon*, 1 *Term Rep.* 427.

5. In caſes of tithe and ſuch ſort of matters, where many things are in controverſy, it is very frequent to order the prohibition to ſtand as to part, and a conſultation to go as to the other part. *Bull. Ni. Pri.* 218.

Property.

28 Vin. 66.

(A) *In what Perſons*, may be, or ſhall be ſaid to be.

AN action of trover cannot be maintained by a tenant in tail, expectant on the determination of an eſtate for life, without impeachment of waſte, for timber which grew upon, and was ſevered from the eſtate; for the property of them is not in him, but in the tenant for life. *Pyne* v. *Dor*, 1 *Term Rep.* 55.

(C) Diveſted or preſerved, by what and when.

IF money and an horſe are given in exchange for another horſe warranted ſound, but which was unſound at the time. Trover will not lie for the horſe given in exchange, becauſe the property is altered. *Power* v. *Wells*, *Cowp.* 818. *Dougl.* 24. *n.* S. C.

(D) *Property gained*, altered, or transferred, by what Act, *&c.*

1. *A.* Sends goods to *B.*, who was at the time indebted to him for other goods; *B.*, ſeeing that his affairs were in a declining ſituation, ſent them to *C.*, who had orders to deliver them to *A.* *Afterwards*, *June* the 4th, *B.* became bankrupt; *June* the 6th he wrote to *A.*, ſtating that his affairs being in a declining ſituation, *he had left the goods* with *C.* for him. *June* 9th a commiſſion iſſued againſt *B.*, and on the 13th *A.* received the letter, which was the firſt notice he had of the delivery of the goods to *C.*, and as ſoon as poſſible he ſignified his conſent to receive them. The queſtion was, Whether theſe goods were not abſolutely veſted in *A.* by the delivery to *C.* before the agreement of *A.*; ſince otherwiſe the act of bankruptcy intervening would prevent the property from veſting in him? And held, that the contract

tract did not ſtand open until agreement, but is complete unleſs there was an actual diſagreement. *Atkins v. Barwick*, 1 *Stra.* 165. 10 *Mod.* 432. *Fort.* 353.

2. But in *Harman & al.* v. *Fiſher*, *Cowp.* 117. where a trader in contemplation of abſconding, incloſed in a letter certain bills to *F.*, a particular creditor, in diſcharge of his debt, ſaying, "he has the honour to ſhew him that preference he conceives is his due;" and this was done without the privity of *F.*, and followed by an act of bankruptcy before the notes could poſſibly be delivered. *Per cur.*—The *eſſential motive* being to give a preference, and the act itſelf incomplete, is clearly void, though in favour of a very meritorious creditor. And *per* Lord *Manſfield*—The judgment in *Atkins* v. *Barwick* is right, but the reaſons wrong. The true ground was, that the trader honeſtly refuſed to *accept* the goods, and returned them. *Salte* v. *Field*, 5 *Term Rep.* 211. *Vide* alſo *Hague* v. *Rolleſton*, 4 *Burr.* 2174. and *Alderſon* v. *Temple*, *Ib.* 2238. where the contract being held incomplete for want of the conſent of the perſon to whom the goods and bills were ſent, and being done in contemplation of bankruptcy, the tranſaction was held fraudulent and void.

3. If goods are *bonâ fide* ſold by the factor at ſea (as they may be where no other delivery can be given) it will be good, notwithſtanding the ſtatute 21 *Jac.* 1. *c.* 19., and the vendee ſhall hold them by virtue of the bill of ſale, though no actual poſſeſſion is delivered. *Per* Lord *Manſfield* in *Wright* v. *Campbell*, 4 *Burr.* 2046.

4. If goods are conſigned to *A.* to ſell them for the conſignor as factor, who pretending that the goods are his own property aſſigns the bill of lading indorſed to him to *B.* for a valuable conſideration and without notice, and then becomes inſolvent; and afterwards the conſignor indorſes the bill of lading remaining in his poſſeſſion to *C.* before the goods arrive, and they are delivered to him; *B.* may recover them in an action of trover. *Wright* v. *Campbell*, *Burr.* 2046. *Sed qu.* for a new trial was there granted on the ground of fraud, and *vide* the caſes ſubſequent.

5. Where ſeveral bills of lading have been ſigned of different imports, no reference is to be had to the time when they were ſigned by the captain; but the perſon who firſt gets one of them by a legal title from the owner or ſhipper has a right to the conſignment. *Caldwell & al.* v. *Ball*, 1 *Term Rep.* 205.

6. Where a merchant conſigns goods, and the conſignee becomes inſolvent before they get into his hands, the conſignor may ſtop them *in tranſitu*. *Snee* v. *Preſcot*, 1 *Atk.* 245. *Birket* v. *Jennings*, cited *Cowp.* 296. *Lickbarrow & al.* v. *Maſon*, 2 *Term Rep.* 63. S. P.

7. But if the conſignee aſſign the bills of lading to a third perſon for a valuable conſideration, the right of the conſignor as againſt ſuch aſſignee is diveſted, for the aſſignment of the bill of lading transfers the property in the cargo. *Ibid.* But this judgment was reverſed in the Exchequer Chamber. 1 *H. Black. Rep.* 357.

357. On appeal to the Houſe of Lords a *venire de novo* was directed.

(G) Gained, altered, or transferred, by Operation of Law.

THE plaintiff recovered in trover againſt the captain for yarn conſigned to him. The captain obtaining an injunction on ſhewing the goods were delivered to the defendant, the plaintiff brought an action againſt him, and held him to bail. And the court diſcharged him on common bail, for by the former recovery the property veſted in the captain, the plaintiff having damages in lieu thereof, and therefore in this action he could not ſay the goods were his. *Adams* v. *Broughton*, 2 *Stra.* 1078. *Andr.* 18.

Note. Vid. S. P. this tit. 18 Vin. (G) note to pl. 3.

(I) Veſts. At what Time.

THE indorſement and delivery of a bill of lading to a creditor *primâ facie* conveys the whole property in the goods from the time of its delivery. *Hibbert & al.* v. *Carter*, 1 *Term Rep.* 745.

Purchaſor.

18 Vin. 111.

(A) Purchaſor. Who.

1. AN heir ſhall take by purchaſe under a deviſe altering the limitation of the eſtate. 1 *Raym.* 728. *Emerſon* v. *Inchbird.* If the anceſtor deviſe his eſtate to his heir at law by will, with other limitations, or in any other ſhape than the courſe of deſcents would direct, ſuch heir ſhall take by purchaſe. *Cro. Eliz.* 431.

2. But if a man ſeiſed in fee deviſes his whole eſtate to his heir at law, ſo that the heir takes neither a greater nor a leſs eſtate by the deviſe than he would have done without it, he ſhall be adjudged to take by deſcent, even though it be charged with incumbrances, this being for the benefit of creditors and others who have demands on the eſtate of the anceſtor. 1 *Rol. Abr.* 626. 1 *Salk.* 241. 1 *Ld. Raym.* 728.

3. In marriage articles the iſſue to be conſidered as purchaſers. 1 *P. Wms.* 145. 291.

4. *A.* enters into partnerſhip in 5ths, with three others for 21 years, for digging mines in *A.*'s land; *A.* to have two fifths, and alſo in conſideration of his ownerſhip of the land, to have a tenth more out of the ſhare of the other partners. Purſuant to the articles they ſearched for the mines, and after two years time and the expence of about 120*l.* they diſcovered a valuable mine, and worked it for about three months, and then *A.* dies, and his widow ſets up a voluntary ſettlement made after marriage. The court inclined that the parties were *as purchaſors*, and that the voluntary ſettlement ſhould not ſtand againſt them. 2 *Vern.* 326.

5. A papiſt cannot take a freehold or leaſehold eſtate by will, becauſe taking by will is taking by purchaſe, and by the expreſs words of the ſtatute 11 & 12 *W.* 3. *c.* 4. a papiſt is diſabled taking by purchaſe; alſo terms for years are expreſsly mentioned in the ſtatute. 3 *P. Wms.* 46. *Davers* v. *Dewes*, *Trin.* 1730.

(B) Favoured. In what Caſes.

18 Vin. 112.

1. THE court will not compel a purchaſor under a decree to accept a doubful title. 2 *P. Wms.* 202. 1721. *Marlow* v. *Smith.*

2. One articles to buy land, and the title is under a will not proved in equity againſt the heir; yet in ſome caſes equity will compel the purchaſor to accept the title. 3 *P. Wms.* 190. 1733. *Colton* v. *Wilſon.*

3. Though a purchaſor did not know of an incumbrance before he paid his money, yet as he knew it before the deed was executed, it affects him with notice. 1 *Atk.* 384. 1739. *Wigg* v. *Wigg.*

4. A man purchaſing for a valuable conſideration, with notice of a voluntary ſettlement, from a perſon who bought without notice, ſhall ſhelter himſelf under the firſt purchaſor. 1 *Atk.* 571. 1738. *Brandlyn* v. *Ord.*

5. A man cannot defend himſelf as a purchaſor for a valuable conſideration under articles only. *Ibid.*

6. Where a purchaſor has given a full value for an eſtate, the miſtake or ignorance of ſome of the parties to a conveyance of their claim under a marriage ſettlement, ſhall not turn to the prejudice of a fair purchaſor. 2 *Atk.* 8. 1737. *Malden* v. *Menill.*

7. A purchaſor with notice himſelf from a perſon who bought without notice, may ſhelter himſelf under the firſt purchaſe. 2 *Atk.* 242. 1741. *Lowther* v. *Charlton.*

8. Purchaſor of an equitable title to a rent charge, muſt try it at law againſt the owner of the land claiming in contradiction thereto. 1 *Veſ.* 392. 1750. *Whitfield* v. *Fauſſet.*

9. A purchaſor may protect himſelf againſt dower, by having got an aſſignment of a term. *Ambl.* 6. 1741. *Swannock* v. *Lifford.*

10. Pur-

10. Purchaſor for a valuable conſideration without notice, by taking an aſſignment of a term, may protect himſelf from meſne incumbrances. *Ambl.* 282. 1755. *Willoughby* v. *Willoughby.*

11. It is no objection on the part of a purchaſor of land ſold by a Maſter, that more land is ſold than is neceſſary for the purpoſes of the teſtator's will. 2 *Bro. Cha. Rep.* 248. 1787. *Lutwick* v. *Winford.*

12. Money having been paid in as earneſt at a ſale of an eſtate, and ordered to be laid out in the funds in part payment of the purchaſe money, the vendor muſt abide by the riſe or fall of the funds. 3 *Bro. Cha. Rep.* 49. 1790. *Poole* v. *Rudd.*

13. The court will not make a purchaſor appoint a clerk in court, which is neceſſary only where the party is to appear. 1 *Veſ. jun.* 94. 1790. *Child* v. *Lord Abingdon.*

14. Purchaſer held not entitled to a conveyance of part, though anſwering the general deſcription in the advertiſement of ſale, as it was not in the contemplation of either party at the time of the purchaſe or conveyance, the purchaſor having been referred to a more particular deſcription, which did not include that part, and the ſurrender having been made according to that, and from his own inſtructions. 1 *Veſ. jun.* 210. 1790. *Calverley* v. *Williams.*

15. If one party thought he had purchaſed *bonâ fide* part of an eſtate, which the other thought he had not ſold, it is a ground to ſet aſide the contract: if both underſtood the whole was to be conveyed, it muſt be conveyed; otherwiſe if neither underſtood ſo. *Ibid.*

16. A purchaſor is not to be compelled to take an equitable eſtate. 2 *Veſ. jun.* 100. 1795. *Abel* v. *Heathcote.*

17. Purchaſor juſtified in taking a fair objection, though overruled. 4 *Veſ. jun.* 631. 1799. *Cox* v. *Chamberlain.*

18. *Query*, Whether a purchaſor under a power to revoke uſes, ſubſtituting other eſtates of equal value, is not bound to ſhew the value of the ſubſtituted eſtates. *Ibid.* 638.

19. A purchaſor not compelled to take a doubtful title, nor will a caſe be directed without his conſent: the court alſo heſitated upon giving ſanction to a title founded on the deſtruction of contingent remainders by the tenant for life, there being no truſtees to ſupport them. 5 *Veſ. jun.* 647. 1800. *Rooke* v. *Kidd.*

18 Vin. 115. (C) Favoured. Plea of being a Purchaſor for a valuable Conſideration.

1. WHATEVER is ſufficient to put a party on inquiry is good notice in equity to that party. 1 *Atk.* 490. 1739. *Smith* v. *Law.*

2. *A.* deviſes the eſtate in queſtion to *B.* in tail, remainder to *C.* in fee; bill by the heir of the body of *B.* for deeds and writings, and poſſeſſion: defendant pleads that he is a purchaſor for a valuable conſideration from *C.* without notice of plaintiff's title: where

where defendant claims under a conveyance, in which there is an eſtate tail prior to the eſtate under which he purchaſed, it is incumbent on him to ſee if that eſtate be ſpent. 1 *Atk.* 522. 1736. *Kelſall* v. *Bennett.*

3. Where by a tranſaction, foreign to the buſineſs in hand, a counſel or attorney employed to look over the title has notice, this ſhall not affect the purchaſor. 2 *Atk.* 242. 1741. *Lowther* v. *Carlton.*

4. Plaintiff, a judgment creditor upon an eſtate in *Middleſex*, prays to be let in upon it preferably to the defendant, a mortgagee of the ſame eſtate, on a ſuggeſtion he had notice of the judgment before the mortgage was executed; the judgment was entered on the 12th *March* 1733, but not regiſtered till the 12th *June* 1735; the mortgage was made the 24th *May* 1735, and regiſtered *June* 2d 1735, there being only a defendant's confeſſion of notice proved, in direct contradiction to his anſwer, and contrary to a poſitive act of parliament made to prevent perjury: the bill, ſo far as it ſought to poſtpone defendant's mortgage, was diſmiſſed with coſts. 2 *Atk.* 275. *Hine* v. *Dodd.* *March* 1741.

5. Denying notice of the plaintiff's title at the time of the execution of the deed, or payment of the conſideration money, is not ſufficient: notice muſt be denied at or before the execution. 2 *Atk.* 397. 1742. *Fitzgerald* v. *Burk.*

6. To be a *bona fide* poſſeſſor is where the perſon poſſeſſing is ignorant of all the facts and circumſtances relating to his adverſary's title. 3 *Atk.* 134. *Dormer* v. *Forteſcue.* *April* 1734.

7. A purchaſor if he denies notice, need only ſet forth the purchaſe deed, and plead his purchaſe in bar to the diſcovery of the title deeds. 3 *Atk.* 302. *Aſton* v. *Aſton.* *Hil.* 1745.

8. To a bill for poſſeſſion, a purchaſe for a valuable conſideration was pleaded, and that the money is *bona fide* ſecured to be paid: the defendant having notice before payment, may never pay. Plea over-ruled. 3 *Atk.* 304. 1745. *Hardingham* v. *Nichols.*

9. Denying notice as to himſelf only, is a negative pregnant that there was notice to his agent. 3 *Atk.* 650. 1748. *Le Neve* v. *Le Neve.*

10. Where the bill charges particular acts of notice, the defendant's denial of notice generally will not do. 3 *Atk.* 815. 1754. *Radford* v. *Wilſon.*

11. Purchaſe for a valuable conſideration held a good defence, though the conſideration was much leſs than the real value. *Ambl.* 764. 1766. *Bullock* v. *Sadlier.*

12. Mortgagee may protect himſelf from diſcovering his title deed, if he denies notice. 2 *Veſ.* 450. 1752. *Senhouſe* v. *Earl.*

13. But ſpecial charges are to be denied as well as notice in general. *Ibid.*

14. Aſſignee of a mortgagee through aſſignments from perſons not having notice of a defect in the title, not bound to diſ-

cover whether he had perſonal notice. 2 *Bro. Cha. Rep.* 66. 1786. *Sweet* v. *Southgate.*

15. The court will not take the leaſt ſtep againſt a purchaſor for a valuable conſideration without notice, not even to perpetuate teſtimony againſt him. 2 *Veſ. jun.* 1794. *Jerrard* v. *Sanders.*

18 Vin. 118.

(D) Affected. In what Caſes.

1. WHERE land is ordered to be ſold, and the money to be part of the perſonal eſtate, the purchaſor is not bound to ſee to the application of the money. *Smith* v. *Guyon*, 1 *Brown's Rep.* 186.

2. In *Gebb* v. *Abbott*, Lord Chancellor ſaid, where debts and legacies are charged on lands, the purchaſor will hold free from the claims of the legatees, for not being bound to ſee to the diſcharge of the debts, he cannot be expected to ſee to the diſcharge of the legacies, which cannot be paid till after the debts. *Ibid.* (*notes*).

3. In the caſe of *Beynon* v. *Gollins*, (reported on a different point 2 *Bro. Rep.* 323.) the bill was diſmiſſed as to the purchaſors, with coſts, they not being bound, under the charge, to ſee to the application of the purchaſe-money.

4. If debts are particularly ſpecified the purchaſor muſt ſee to the payment; but if more is ſold than is ſufficient, he is not obliged to enter into the account. *Spalding* v. *Shalmer*, 1 *Vern.* 301. *Vide* alſo *Ithell* v. *Beane*, 1 *Veſ.* 215. and *Rogers* v. *Skillievene*, *Ambler*, 188.

5. Where the firſt truſt is for payment of debts, the purchaſor is not bound to look to the application of the purchaſe-money. *Williamſon* v. *Curtis*, 3 *Bro. Rep.* 96.

6. Where there is a purchaſe from executors and long poſſeſſion, even under ſuſpicious circumſtances of fraud, the court will not relieve. *Andrews* v. *Wrigley*, 4 *ibid.* 125.

7. If a power be not purſued, there ſhall be relief in equity in behalf of a purchaſor. *Per Treby*, 3 *Ca. Ch.* 89.

8. If there is a truſt for the payment of debts generally, a purchaſor ſhall not be affected, though he has notice. 1 *Vern.* 260.

9. But if the truſt be for payment of debts mentioned in the ſchedule, a purchaſor ought to apply the whole money paid by him to the debts, otherwiſe he ſhall be affected by the debts not diſcharged. 1 *Vern.* 303. 260. *Lloyd* v. *Baldwin*, 1 *Veſ.* 173. *Vide Ambler*, 188, 9. 1 *Brownl.* 186.

10. So, if an act of parliament enables a tenant for life to raiſe money for rebuilding and ſtocking a printing-office, burnt down by fire, the mortgagee who advances money upon this ſecurity ſhall be affected, if the monies advanced are not applied to this particular purpoſe. 2 *Vern.* 6.

11. If

11. If the purchaſor of lands in *Middleſex* knows they are charged with an annuity, he ſhall pay it, though the grant was not regiſtered according to 7 *Ann. c.* 20. *Cheval* v. *Nichols*, 1 *Stra.* 664.

12. If a man after marriage, in conſideration of 100*l.* paid by his wife's mother, ſettles 100*l. per ann.* on himſelf for life, remainder to his ſon, *&c.* and his mother joins in the conveyance, and thirteen years after he mortgages, the mortgagee ſhall not foreclose. *Jones* v. *Marſh*, *N.* 8 *G.* 2.

13. A purchaſor for a full conſideration ſhall not be prejudiced by the miſtake or ignorance of ſome of the parties to the conveyance of their claim under a marriage ſettlement. *Malden* v. *Merril*, 2 *Atk.* 8.

14. A purchaſor without notice of a prior incumbrance ſhall not be impeached or prejudiced by it in equity. *Eq. Abr.* 333.

15. Nor diſcover his title, nor loſe any advantage that he has by law. *Ibid.*

16. Defendant ſtating by anſwer a purchaſe for valuable conſideration, ſhall not be compelled to anſwer farther. *Jerrard* v. *Saunders*, 2 *Veſ. jun.* 454.

17. A purchaſor ſhall have the benefit of an old mortgage aſſigned to him, though nothing is due upon it. *R.* 2 *Vern.* 159.

18. A purchaſor of an eſtate after it has been in controverſy in this court, on filing his ſupplemental bill, comes here *pro bono et malo*, and is liable to all coſts from the beginning to the end of the ſuit. 1 *Atk.* 572. 1739. *Anon.*

19. An heir at law is as much at liberty to invalidate a will as the deviſees to ſupport it, and ſuch a ſuit is to all intents a *lis pendens*. 2 *Atk.* 174. 1741. *Garth* v. *Ward.*

20. If an heir conveys an eſtate to a ſtranger whilſt there is a ſuit for eſtabliſhing a will, and it is afterwards eſtabliſhed, the grantee of the heir is bound. *Ibid.*

21. If during a ſuit to redeem, the mortgagor aſſigns the equity of redemption, and there is a decree againſt him, the aſſignee is bound by it. *Ibid.*

22. If an heir at law in a ſuit to eſtabliſh a will prevails againſt it, he ſhall have the benefit of the evidence in that cauſe againſt a purchaſor *pendente lite*. *Ibid.* 1741.

23. The regiſter act is notice to every body, and the meaning was to prevent parol proof of notice. 2 *Atk.* 275. 1741. *Hine* v. *Dodd.*

24. It is only in caſes of fraud the court has broken in upon the act, though one incumbrance was regiſtered before the other. *Ibid.*

25. Clear notice is a proper ground of relief; but ſuſpicious notice, though a ſtrong one, will not juſtify the court in breaking in upon the act of parliament. *Ibid.*

26. If the purchaſor under a private contract does not pay the purchaſe-money at the time fixed, he will be chargeable with intereſt; as he muſt bear any loſs, ſo likewiſe will he be entitled to

any profits which may happen to the eſtate. 2 *Atk.* 490. 1742. *Day* v. *Barber.*

27. If a perſon will purchaſe with notice of another's title, giving a valuable conſideration will not avail. 3 *Atk.* 238. 1745. *Mead.* v. *Lord Orrery.*

28. Whoever takes from an executor muſt do it with notice of a will, and if the doctrine were to prevail of notice to an aſſignee of an executor, it would hold in every will, and none would dare to purchaſe or take an aſſignment from an executor. 3 *Atk.* 238. 1745. *Mead* v. *Lord Orrery.*

29. A *lis pendens* cannot affect any particular perſon with fraud, unleſs he has a ſpecial notice of the title in diſpute there. *Ibid.* 243.

30. A decree is not an implied notice to a purchaſor after the cauſe is ended: but it is the pendency of the ſuit which creates the notice. 3 *Atk.* 392. 1746. *Worſley* v. *Earl Scarborough.*

31. Notice to an agent or counſel who was employed in the buſineſs by another perſon, and at another time, is no notice to a client who employs him afterwards. *Ibid.*

32. Notice to an agent, as well as perſonal notice, will affect the party, and the depoſition of the agent will be allowed to be read. 1 *Veſ.* 62. 1747. *Maddox* v. *Maddox.*

33. Though the regiſter act veſts the legal eſtate according to the prior regiſtry, yet is it left open to all equity; and notice even to an agent of a prior purchaſe not regiſtered, will affect a ſubſequent purchaſe though regiſtered. 1 *Veſ.* 67. 1747. *Le Neve* v. *Le Neve.*

34. Where notice ſhould be given of the iſſuing of a commiſſion for an inqueſt. 1 *Veſ.* 269. 1749. *K.* v. *Daly.*

35. Notice to an agent placing out money on a mortgage, of a prior judgment, ſhall affect the employer. 2 *Veſ.* 370. 1751. *Aſhley* v. *Bailee.*

36. Deviſe of land charged with payment of debts; if the deviſee ſells, pending a ſuit for ſale and payment of debts, ſuch an alienation is void. *Ambl.* 678. 1768. *Walker* v. *Smalwood.*

37. Mortgagee of a leaſe, which recited the ſurrender of a former leaſe, which was upon the ſurrender of a former, in which the plaintiff's title appeared, held to have notice of the title. 1 *Bro. Ch. Rep.* 291. 1788. *Coppin* v. *Fernyhough.*

38. Purchaſor delaying payment ordered to pay intereſt. 1 *Veſ. jun.* 94. 1790. *Child* v. *Lord Abingdon.*

39. The expence of conveyance falls on the purchaſor, if there be no particular ſtipulation. 2 *Veſ. jun.* 155. 1793. *Duke of Bolton* v. *Williams.*

40. Purchaſor with notice is bound in all reſpects as the vendor; therefore where tenant for life granted leaſes for lives under a power, and bound himſelf upon the dropping of a life to grant a new leaſe, with the ſame proviſion for renewal on the death of any perſon to be named in any future leaſe, and afterwards joined in a ſale, though the power is exceeded, yet if a life drops in the life of

of the leſſor, the purchaſor having notice muſt ſpecifically perform by granting a new leaſe, with the ſame proviſion: general notice to a purchaſor that there are leaſes, is notice of all their contents. 2 *Veſ. jun.* 437. 1794. *Taylor* v. *Stibbert.*

41. Purchaſor being told that part of the eſtate was in poſſeſſion of a tenant, was bound by the leaſe. *Ibid.* 440.

(F) Affected by Miſapplicaton or the Money. 18Vin. 122.

1. ON a truſt or deviſe for payment of debts in general, without a ſpecification of the debts in a ſchedule, a purchaſor would be indemnified, and not obliged to ſee to the application of the money, or look after the creditors; but if there is ſuch a ſpecification, or ſchedule, a purchaſor or mortgagee is bound to ſee to the application of the purchaſe-money. 1 *Veſ.* 173. *Vide* alſo 1 *Veſ.* 215. *Lloyd* v. *Baldwin. Dec.* 1748.

2. Deviſe to ſell and pay debts generally; a purchaſor is not bound to ſee to the application of the purchaſe-money. *Ambl.* 188. 1758. *Rogers* v. *Shillicorne.*

3. Where land is ordered generally to be ſold, and the money to be part of the perſonal eſtate, the purchaſor is not bound to ſee to the application of the money. 1 *Bro. Ch. Rep.* 186. 1783. *Smith* v. *Guyen.*

4. Where the firſt truſt is for the payment of debts, the purchaſor is not bound to look to the application of the purchaſe-money. 3 *Br. Ch. Rep.* 96. 1790. *Williamſon* v. *Curtis.*

5. Purchaſor not permitted to apply part of his purchaſe-money in diſcharge of a mortgage on the eſtate, though ſome of the parties conſented, others being infants, and ſuch incumbrance not appearing on the report. 1 *Veſ. jun.* 266. 1791. ——— v. *Strutton.*

(G) Affected by preſumptive Notice, where there is no Settlement. 18Vin. 123.

1. THOUGH a country attorney acts by an agent in cauſes in this court, yet he is to be conſidered as the ſolicitor likewiſe, though he reſides in the country; and what is known to him is conſtructive notice to his clients. 3 *Atk.* 37. 1743. *Norris* v. *Le Neve.*

2. The agent of the defendant having full notice of the ſettlement made upon the huſband's firſt marriage, this is notice to the defendant, and is alſo a ſufficient equity in the plaintiff to poſtpone the ſecond articles and ſettlement, notwithſtanding theſe laſt only have been regiſtered. 3 *Atk.* 646. 1 *Veſ.* 64. 1748. *Le Neve* v. *Le Neve.*

3. As in purchaſes, and eſpecially in mortgages, the ſame counſel and agents are frequently employed on both ſides, there-

fore each ſide is affected with notice as much as if different counſel and agents had been employed. 3 *Atk.* 646. 1 *Veſ.* 64. 1748. *Le Neve* v. *Le Neve.*

4. If on a marriage ſettlement an agent is employed on both ſides, both will be affected by notice to him; nor is it material on whoſe recommendation or advice he was employed. 1 *Veſ.* 64. 1747. *Le Neve* v. *Le Neve.*

5. No conſtructive notice from title-deeds, *&c.* to be laid before a counſel or attorney, or any thing that could not be ſuppoſed to make an impreſſion on the memory. 2 *Veſ.* 370. 1751. *Aſhley* v. *Baillie.*

6. Notice of ancient marriage articles, by which an eſtate is agreed to be ſettled on huſband for life, remainder to the heirs of his body, ſhall not affect the title of a purchaſor from the huſband by reaſon of the modern way of carrying ſuch articles into execution. *Ambl.* 285. 1755. *Senhouſe* v. *Earl.*

7. If a purchaſor cannot make out a title, but through a deed which leads to a fact, he will be affected with notice of that fact. *Ambl.* 311. 1756. *Mertius* v. *Joliffe.*

8. Purchaſor of land in a regiſtered county, whoſe conveyance is regiſtered, ſhall be affected by notice of a prior purchaſor whoſe deeds were not regiſtered, and be poſtponed to him. *Ambl.* 436. *Le Neve* v. *Le Neve.* *Dec.* 1747.

9. *Query*, Whether a truſtee having prepared a deed of appointment under a power, but not knowing of the execution of the deed, ſhall be preſumed to have ſuch notice as to affect him in reſpect of his payment of the money to a legatee under a ſubſequent will of the perſon who had the power. 2 *Bro. Ch. Rep.* 391. 1788. *Lothay* v. *Sydenham.*

18 Vin. 125.

(K) Diſputes between Purchaſor and Purchaſor.

1. THE intent of the regiſter act 7 *Ann. c.* 20. was to ſecure ſubſequent purchaſors againſt prior ſecret conveyances. If a ſubſequent purchaſor had notice of a prior conveyance, then that was not a ſecret conveyance by which he could be prejudiced. The enacting clauſe gives a ſubſequent purchaſor the legal eſtate, but does not ſay he is not left open to any equity which a prior purchaſor or incumbrancer may have. 1 *Veſ.* 67. 1747. *Le Neve* v. *Le Neve.*

2. Prior incumbrancer cannot turn intereſt into principal to the prejudice of a ſubſequent incumbrancer, after notice. *Ambl.* 612. 1763. *Digby* v. *Craggs.*

3. Regiſtration in *Middleſex* under the ſtatute of an equitable eſtate, is not of itſelf notice to a ſubſequent legal mortgagee ſo as to take from him his legal advantage. *Ambl.* 678. 1768. *Morecock* v. *Dickins.*

4. Regiſtration in a regiſtered county is not notice of itſelf. *Ibid.*

5. One

5. One purchaſor ſubſtituted for another on motion and conſent. 2 *Bro. Ch. Rep.* 391. 1788. *Mathews* v. *Stubbs.*

6. The court will not diſcharge a purchaſor and ſubſtitute another even upon paying in the money, without an affidavit, that there is no under-bargain. 6 *Veſ. jun.* 515. 1801. *Rigby* v. *Macnamara. Vale* v. *Davenport*, 6 *Veſ. jun.* 615. S. P.

(L) Purchaſor, Biddings, Sale, and Depoſit.

1. WHEN money is to be laid out under a marriage ſettlement in purchaſes, application muſt be made to the court in each ſeparate purchaſe. 1 *Bro. Ch. Rep.* 74. 1780. *Harrington* v. *Flemming.*

2. Biddings opened on ſpecial circumſtances, but not on mere inadequacy of price. 1 *Bro. Ch. Rep.* 287. 1783. *Prideaux* v. *Prideaux*, 2 *Veſ. jun.* 51. S. P.

3. Where, on opening the biddings, the depoſit was ordered to be laid out in the funds, and the ſtocks roſe, the purchaſor was held not entitled to the advantage of the riſe. 2 *Bro. Ch. Rep.* 32. 1785. *Doyley* v. *Counteſs of Pewis.*

4. On a ſale in this court, the biddings may be opened even a ſecond time, where the report of the purchaſor has not been confirmed; but ſhall not be opened at all, if the report has been confirmed. 3 *Bro. Ch. Rep.* 475. 1792. *Scott* v. *Neſbitt.*

5. Biddings opened on a conſiderable advance, for an eſtate ſold before the Maſter in ſeparate lots, and the eſtate ordered to be ſold in one lot; the reſiduary legatee and truſtee appearing and conſenting. 4 *Bro. Ch. Rep.* 113. 1792. *Watts* v. *Martin.*

6. Biddings are opened for the benefit of the ſuitor and of the eſtate, not of the purchaſor; as where he was too late, and the over-bidding is ſmall. 1 *Veſ. jun.* 453. *Anon. April* 1792.

7. Biddings opened after confirmation of the report, upon ſpecial circumſtances, as fraud. 2 *Veſ. jun.* 51. 4 *Bro. Ch. Rep.* 172. S. C. *Watſon* v. *Birch.*

8. Motion, that a perſon reported beſt purchaſor ſhould complete his purchaſe by a certain day, refuſed, the report not being abſolutely confirmed. 2 *Veſ. jun.* 335. 1794. *Anon.*

9. The bill praying an inquiry into the title and a ſpecific performance, on the defendant's motion, after anſwer, an enquiry was directed as to the title, at what time the abſtract was delivered, and whether it was ſufficient; but the court would not decide upon any matter of relief. 3 *Veſ. jun.* 279. 1796. *Moſs* v. *Matthews.*

10. Relief againſt forfeiture of the depoſit, putting the other party in the ſame ſituation as if the contract had been performed at the time agreed. *Ibid.*

11. Exceptions, that the perſons entitled to the purchaſe-money, ſubject to the charges, were not parties to the conveyance, overruled,

ruled. 3 *Veſ. jun.* 504. 1797. *Wakeman* v. *The Dutcheſs of Rutland.*

12. On opening biddings, the court, in the reference of coſts of the purchaſor, will not give a particular direction for a ſpecific expence. 2 *Veſ. jun.* 286. 1793. *Anon.*

13. Biddings opened on advancing 100*l.* on 800*l.* and 200*l.* on 1200*l.* *Ibid.* 487.

14. Biddings opened on advance of 50*l.* on 380*l.* and paying the expence, 10*l. per cent.* not ſufficient on a ſmall ſum. 4 *Veſ. jun.* 700. 1799. *Upton* v. *Lord Ferrers.*

15. Biddings opened after the report confirmed ſimply upon an advance of 61*l.* on 305*l.*, 35*l.* not ſufficient. 5 *Veſ. jun.* 86. 1799. *Chetham* v. *Grugeon.*

16. Biddings opened on advance of 200*l.* upon 3200*l.*, but 100*l.* was held too little. 5 *Veſ. jun.* 148. 1799. *Anon.*

17. Biddings opened on an advance of 200*l.* on 2360*l.*; the perſon, on whoſe behalf the motion was made, being prevented from bidding, and having employed a ſurveyor to value the eſtate, who attended as agent bidding for the purchaſor. 5 *Veſ. jun.* 655. 1800. *Tait* v. *Lord Northwich.*



END OF THE FIFTH VOLUME.

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